FACULTY OF LAW

UNIVERSITY OF TORONTO

and

LAW SCHOOL

DALHOUSIE UNIVERSITY

MATERIALS ON CONFLICT OF LAWS

VOLUME I

January 1994

John Swan

Aird & Berlis
Toronto

Vaughan Black

Dalhousie University
Halifax

We are grateful for the help of many students over the past many years in the constant revisions in the organization and text of these materials.

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INTRODUCTION

We know that you may be tempted to ignore this introduction: after all it won't be on any exam. Please do not ignore it. We have laboured over it, and in the case of one of us at least, for longer than we care to remember, and it is an attempt to introduce you to an area of the law that is simultaneously very important and very widely misunderstood. It is no exaggeration to say that every one of you who proceeds to the Bar Admission course will have a conflicts problem to deal with as an articled student, and that the extent of the ignorance of the vast majority of lawyers of the topic covered by this course has to be heard to be believed.

We are not so optimistic as to believe that what we have said here is so transparently clear that all your problems in dealing with what follows in these materials will evaporate if you read this introduction. Even if you do not fully understand all that we have said here and if we do not achieve that dream of all teachers, that you will suddenly cry, "Eureka!" on reading this introduction (or these materials) we believe that this introduction will be useful now, and that it may even—perish the thought of extra work!—repay later re-reading.

1. THE QUESTIONS CENTRAL TO THE CONFLICT OF LAWS

In most cases that come before the courts of a province[1] all the facts—or, at least, all the relevant facts—have occurred in that province. When there are relevant facts that have occurred outside the province, the rules and principles of the Conflict of Laws are used to reach a solution. In other words, the subject matter of the Conflict of Laws consists of cases with geographically complex facts.

Such cases raise three related and interdependent problems:

1. In what circumstances should the presence of geographically complex facts influence the decision of the court before which the plaintiff has brought its claim to take jurisdiction to determine the controversy?

2. What response does (or should) the court make to a claim presented by a party based on a judgment of another court in that party's favour? Does it (or

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[1]We refer throughout these materials primarily to provincial courts. The courts of general jurisdiction in Canada are the courts created by each of the provinces under their constitutional power to provide for the administration of justice in the province: *Constitution Act, 1867*, s. 92(14). We shall examine some of the special problems that arise from the existence of Canadian as opposed to provincial courts, the Supreme Court of Canada and the Federal Court of Canada, but these problems are to a significant extent very different from those facing provincial courts before which almost all the issues which these materials will examine arise.

should it) matter if that "foreign"[2] judgment is that of another Canadian court or of a court of a foreign country? Does such a foreign judgment prevent further action in a province (or in Canada) arising out of the same facts? Does the judgment in favour of the plaintiff in the original proceedings give a cause of action to that party before a provincial court so that the foreign judgment can be "transformed" into a judgment of the local court on which a writ of seizure and sale may issue?

3. In what circumstances, if any, should the presence of geographically complex facts induce a court to consider determining the controversy by reference to some other law or rule of decision than that of the province[3] in which the court before which the plaintiff has brought his, her or its claim is situated?

The reason that cases with geographically complex facts present special problems is that in a case that has relevant factual connections with, for example both Ontario and Québec, the presence of non-Ontario facts may justify the decision of the Ontario courts not to take jurisdiction to hear the claim presented by the plaintiff. As regards the second question, a plaintiff who, for example, has induced the British Columbia Supreme Court to take jurisdiction in her dispute with an Ontario corporation, and who has obtained from that court a judgment against the Ontario defendant which is unsatisfied, might come before the Ontario Court with the British Columbia judgment and ask that it be enforced in Ontario. The need for the plaintiff to try this method of getting payment may arise from the fact that the defendant has no assets in British Columbia, but has assets in Ontario which can be seized and from the costs the plaintiff will occur if she has to start all over again in Ontario. Similarly, the third question may suggest an argument that in a case in which there are relevant facts which occurred in both Ontario and Québec the rights of the parties should be determined with reference to Québec law rather than Ontario law because of the presence of non-Ontario facts in the case.

Any case of any kind may present such kinds of facts. In practice, the approach of a court in Canada to a criminal case where, for example, the crime was committed outside Canada is determined by the Criminal Code. Again, problems of extraterritorial taxation and of administrative regulation are typically resolved by the application of statutory rules which cover all the issues

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[2]It is necessary to use the word "foreign" here for there is no neat or concise term to include judgments of other provincial courts and those of courts of truly foreign countries like France, the United Kingdom or the United States of America. The word "extra-territorial" might be a substitute, but it is longer and its connotations are no clearer than those of the word "foreign". Since each province, under the *Constitution Act, 1867*, enjoys a degree of sovereignty, each may regard the judgment of a court of another province as being in a sense a judgment of a court of a foreign sovereign.

[3]Again there are terminological problems to be noted. A case brought before the courts of a province, e.g., the Ontario Court, may be decided by reference to Canadian law as opposed to provincial law. The phrase "Canadian law" as used here refers to those largely statutory rules established by the parliament of Canada in the exercise of its powers under the *Constitution Act, 1867*. We must again note that the existence and jurisdiction of the Federal Court of Canada raises complex and special problems which will be investigated later in these materials.

presented to the court, though as we shall see, not all issues are resolved by statutory interpretation and some are within the area of our concern.

The principal scope for the rules and principles of the Conflict of Laws are cases in the private law field—contracts, property, negotiable instruments, torts, family law, succession, bankruptcy, etc. We will see that, while some of the potential problems have been resolved by statute, there remains a large area where solutions can only be found in the approaches developed by the judges.

One focus of this course will be on the methods that the courts have adopted to solve conflicts problems and on the consequences of these methods. At the same time, the area of conflicts has been (and still is), for better or for worse, the preserve of the academics and their writings have had a major impact on the rules that have been developed. We shall examine their contributions carefully.

Some of the terminological problems which arise in describing the focus and issues that we shall discuss have been mentioned. These problems are endemic and ubiquitous, and a large part of our time will be taken up with the difficulties created by loose language and the need to develop very precise arguments about the issues we shall examine.

The term "Conflict of Laws" is itself not free from difficulty. That term is the common rubric in the common law to describe cases that present geographically complex facts. The phrase "conflits des lois" as a french translation is sometimes used in civil[4] law systems, but the more usual phrase in those systems is "droit international privé", or its equivalent in the other languages. As a result of the strong civilian tradition in the theory of Conflicts, the phrase "Private International Law" is sometimes used even in the common law. We say, "even in the common law", for the common law has always been strongly xenophobic, and only in Conflicts is there any trace of a significant civilian influence. At least since the time of Austin (*The Province of Jurisprudence Determined*, 1859) common law lawyers have always been very condescending towards international law. They took (and still largely take) the view that it is not real "law" because it lacks that which is essential to the positivist view of law, *viz.*, a sovereign or sanctions. The Canadian law of contracts, torts, and, to a much smaller degree, family law, etc., remains based on the rules and approaches of the common law, and except where there has been legislative intervention, the roots of the law can be traced back for centuries.

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[4]The term "civil law" or "civilian" refers to or connotes systems of law or theories of law derived from the Roman law. Most European systems are part of this tradition, as is the law of Japan. The theoretical differences between the civilian tradition and that of the common law are far larger that the actual differences detectable in the results of the cases. As is common in legal analysis, the similarities are overshadowed by the theoretical differences. Arguments based on the fact that in almost all legal systems commercial cases will usually be decided in nearly identical ways will be seen to be extremely powerful. Such arguments largely undercut the significance of the theoretical differences between the two systems of law.

2. NOTE ON THE MATERIALS

As is usual in the materials that you see in law school, a large proportion of these materials consists of extracts from judgments. There are a number of reasons that help to explain this fact. The most obvious is the easy access that we have to the judgments of the courts. We shall try to reduce the effect that this fact might have on your attitude to the materials by offering examples of statutes, clauses taken from contracts, other kinds of agreements and arrangements that are not based on any agreement to illustrate the work of the solicitor who is planning his or her client's affairs with an eye to the possibility of there being a conflicts problem in the future. It is inevitable that the number of pages taken up with such examples will be far less than the number taken up with extracts from judgments, but we ask you not to underestimate the importance of the planning function of the lawyer and to keep its importance always in mind. We shall emphasize examples of legislation that either exists to avoid some problem of the common law of conflicts, or makes use of conflicts rules to achieve its end.

We make no claim that we shall do something that is radically different from any other course. All that we can say is that we do not want to do anything other than help you to understand a body of law that is nothing if it is not confusing and seriously misunderstood. To understand why the law is as it is and the origin of some of the rules we shall consider (and to give you a basis for any research that you might have to do) we use the smallest (though still a distressingly large) number of cases that we think will illustrate these points. We shall include a number of articles or extracts from articles.

As in every other area of the law you must be wary of the focus on judgments and on the role of the litigator, for it makes the work of the "court-room" lawyer appear to be more important than it really is. We shall always have to consider what lessons the judgments have for the solicitor who is trying to keep his client out of trouble, and especially out of litigation—clients have a most deplorable dislike of getting involved in litigation, an attitude that does nothing for the prosperity of the legal profession. Reading judgments in an effort to plan around the rules that they suggest is both more difficult and more central to the lawyer's function than is the use of judgments as the basis for arguments in a dispute.

We shall spend a significant amount of time examining the contributions of academics to the development of the law. The role of the academic in the development of both the rules and the theoretical structure of the conflict of laws, and the importance of what the academics have created makes a focus on what they have said of great importance. Consistently with what we have said about the use you should make of judgments, we shall assess the usefulness of the academic contribution to see what guidance that contribution gives to either the barrister or to the solicitor who has to deal with the pressing and mundane problems of clients.

The judgments that we shall examine are almost entirely from courts in common law jurisdictions. The contributions of the academics are taken exclusively from those writing in the same tradition. This focus is not the result of either chauvinism or xenophobia: it is justified by the simple fact that we have enough to occupy our time with what we have to examine, and

a wider focus would only be useful if we could develop an understanding of a fundamentally different concept of law, of the role of the courts in its development, and of rules which are based on political and social ideas that may have little relevance to the common law world. The language problem is another difficulty we can do little about. We shall see enough of the rules of civilian jurisdictions to catch a brief glimpse of both the conceptual gulf that often divides us from that world, and of the fact that radically different legal regimes will nearly always resolve similar problems in the same way, so that however large the difference in starting positions may be, it frequently means very little in the actual results reached in the cases.

There are, however, problems where the differences between the competing jurisdictions are so fundamental and pervasive that it is not at all clear that any kind of accommodation is possible. We shall, for example, look at the problem of the adoption of native children by non-native adoptive parents in Volume III of these materials. Here we find that something that we might assume to be as self-evident as that the decision whether the child should stay with his or her adoptive parents or go back to his or her natural parents or to a native relative should be based on what is in the child's best interest may not be accepted by all those involved. What we may call the "western" concept of personality—the individual alone is the focus of rights and obligations—provides a focus that makes the individual important. This view, too, may be challenged by the view that what is important is not the individual but the band or group. To make matters even worse, there may be no decision making process that will be acceptable to everyone. The dispute resolution mechanism characterized by adjudication with the opportunities that it provides for participation by those affected may not be acceptable to those who believe in the need for consensus or in group decision-making processes. Yet few would deny that the problem that our example has raised and which has to be decided is, to say the least, of transcendent importance for everyone involved. How, or how well, the law can resolve a problem of this type will test the limits of our imagination. What this kind of problem will force us to do is to stand far enough back from our assumptions and those beliefs and values that we think are "natural" or "obvious" to see that they may be neither. For the moment, the problems we shall examine raise much less difficult problems. The materials will, we hope, bring out the problems that different legal, social and cultural systems may present.

It is hard to know where to look for really useful material to explain the issues and problems of conflicts. As we shall see, any extensive focus on the work of the courts will create problems for any analysis that we might try to develop, for the courts do not have as extensive an experience in this area as they do in areas like contracts, tort or property. In other words, the courts simply do not have to decide that many conflicts cases compared with those in the other areas of the law. There is, of course, the point we have just made that the courts themselves may be as much part of the problem as they are of a solution.

The work of the academics occasionally explains what the problems are or what the courts are doing, but more often, offers extensive criticism of what either the courts or other academics do or say, and suggests solutions which, if adopted by the courts, are frequently flawed, or which are objectionable on more theoretical grounds. In other words, the search for workable and sound rules is very difficult, and both our imagination and legal skills will be tested in the

effort to find such rules.

There are a number of reasons for the fact that the courts hear so few conflicts cases, but among the more important is the instinctive horror of most practising lawyers for conflicts issues—perhaps justified and explained by their general ignorance of the area. One result of this feeling is that either a conflicts case, i.e., a case in which the lawyers involved see that there are possibly relevant foreign facts, is not litigated with the result that many potential conflicts cases never get brought before the courts, or if such a case does get litigated, both courts and counsel may conspire to hide the conflicts aspects. Lawyers sometimes simply fail to perceive the conflicts issues in cases they are working on.

Perhaps things will change. Canada has recently adhered to important international conventions regarding international trade. One such convention relates to arbitrations and the enforceability of foreign arbitral awards. Another relates to the international sale of goods. Others deal with the very serious problem of inter-jurisdictional child abduction. The provinces have introduced legislation to implement these three conventions.[5] Ontario now has, for example, the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, the *International Sale of Goods Act*, R.S.O. 1990, c. I.10 and the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, ss. 40-46 (incorporating the *Convention on Civil Aspects of International Child Abduction*). It is too early to know if this legislation will have any impact on the extent to which Ontario courts will be involved in international litigation. One result of the *International Commercial Arbitration Act* may be that the number of international arbitrations in this country may increase, and that, in consequence, the number of cases brought before the courts may be reduced. It is impossible to discover how many contracts provide for arbitration: solicitors and clients generally favour arbitration; litigators generally oppose it; recent Ontario legislation, the *Arbitration Act, 1991*, S.O. 1991, c. 17, strongly encourages it. Up to now it may be assumed that if an international commercial agreement, e.g., a contract for the international sale of goods or for carriage now provides for arbitration, it will usually provide for arbitration in London, Paris or New York. The courts of British Columbia have had the largest number of international cases of any Canadian court.

There are some international arbitrations in Canada—the arbitration over the price of coal sold to Japan by Quintette Coal Limited (mentioned below) being one of the first—but very few in comparison with those in some other countries. Some idea of the scale of arbitration in London, for example, is provided by the fact that over 50,000 appointments of arbitrators are made in London each year and over 10,000 awards are given. Another illustration of the same fact is that all but one of the international contracts cases coming before the House of Lords, and reported from [1971] A.C. to [1983] A.C., that involved a dispute between the two parties to the contract, was preceded by arbitration. In contrast, no case before the Federal Court of Canada since its creation in 1972, until 1985 has been preceded by arbitration. The Federal

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[5]In Canada the federal government has, under the *Constitution Act, 1867*, the power to enter into international treaties or agreements. As the "free trade" debate illustrated, that power may not extend to the enactment of legislation to bring the treaty into effect.

Court is relevant for comparative purposes because many international contracts involve charter-parties and international bills of lading that come within the exclusive jurisdiction of that Court. All of the cases in the House of Lords would have come before the Federal Court had they been litigated in Canada. The legislation applicable to matters that might end up in the Federal Court would probably not be a provincial *Arbitration Act* but the federal act, the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp). This act applies only to matters where at least one of the parties is the federal crown, a departmental or Crown corporation or in relation to maritime or admiralty matters (s. 5(2)). The federal parliament would not have jurisdiction to enact a general arbitration act.

There is an International Arbitration Centre in Vancouver financed by the provincial government, though the volume of business that it has done, in spite of its location in one of the most scenically attractive sites in the city, is not yet large. The Ontario government had plans to develop and support a similar centre in Toronto, but we do not know what has become of them. So far as we are aware, there has been no significant increase in the number of international arbitrations as a result of the federal and provincial legislative changes or other efforts. The arbitration that took place over the agreement for the sale of coal from the Quintette mine in British Columbia to the Japanese steel mills was the first large-scale international commercial arbitration in this country. It is doubtful if the experience of the parties, particularly the Japanese, was such as to make international arbitration in Canada very attractive to foreigners.

We shall very briefly examine the issues in international (and interprovincial) arbitrations later in the materials.

3. THE PURPOSE OF THE MATERIALS

The purpose of our examination of these materials is to achieve an understanding of the Conflict of Laws. It is worth pausing for a moment to consider what an understanding of Conflicts looks like. In other words, what should you get out of an examination of these materials or of a course on Conflicts? There are two goals that these materials are designed to achieve. The first goal is an understanding of how the law is conventionally organized: What concepts or doctrines are regarded as providing guides? What are the rules applied by the courts?

The second is the more difficult part. We ask now if the rules are truly useful as predictions of what the courts will do. Do the rules mask or obscure the real reasons for the decision? Are there any principles that provide a better basis for understanding what the courts will do or what they should do? An understanding of the second kind is not mere academic fluff from the point of view of the hard-nosed practising lawyer. It provides the only sound basis on which he or she can advise his or her client, and often it provides the means for rescuing a client from the consequences of thoroughly unsatisfactory doctrine. It provides a basis for an informed and creative sense of what is fair and of what justice consists.

The traditional method of analysis adopted by the Canadian courts has been almost exclusively

based on the decisions of English judges and the writings of English academics. This approach, though at times pragmatic in orientation, is heavily characterized by a conceptual analysis. One explanation of such an approach is the influence of civilian theories on English academics. As we have mentioned, the common law usually prides itself on its freedom from the intellectual "pollution" of the civil law, but in Conflicts analysis the civilian influence is as obvious as the prevalence of latin phrases. It will be seen that the traditional approach presents major problems, and ways to avoid these will have to be explored.

One further point requires emphasis. An understanding of Conflicts is no different from an understanding of any other area of the law, in that there is no such thing as a single understanding. The point to remember is simply that there are different understandings and that each has certain characteristics and, what is more important, that each is based on certain assumptions about law, its purpose in society and the values that it represents. After these have been spelled out, you may conclude that you cannot accept a particular understanding, and that some other is preferable. If, for example, you believe that the law of contracts exists to serve identifiable social values and to give effect to the parties' reasonable expectations, then an understanding that ignores those concerns will probably be unsatisfactory to you, for it is based on a different set of assumptions.

The same variety occurs in what an understanding of Conflicts is. These materials will explore at least two general types of understandings. The traditional understanding in conflicts is that of Dicey & Morris, *The Conflict of Laws*, 11th ed. (London: Stevens, 1987) ("*Dicey & Morris*") Cheshire & North's *Private International Law*, 11th ed. (London: Butterworths, 1987) ("*Cheshire & North*") (This is the same "Cheshire" as in Cheshire & Fifoot.) As we have already mentioned, an alternative term for "Conflicts" is "Private International Law": we shall consider some of the implications of the nomenclature later in the course. A large number of competing understandings are based on, or are developments of the work done by three people in the United States. They are Brainerd Currie, David Cavers and Willis Reese, the Reporter for the *Restatement, Second, Conflict of Laws*.

As well as these approaches to conflicts, these materials will seek to develop another which, while owing much to the American scholars who have been mentioned, differs from theirs in significant ways. The features of such an approach will be elaborated in the context of the materials that follow. The governing purposes of such an approach are three:

1. Fairness to the individuals caught up in the toils of the law,

2. Predictively useful rules and methods, and

3. Faithfulness to the values expressed in the division of powers in the Canadian Constitution, and to the demands of a federal system in Canada.

These goals suggest a simultaneous and equal concern for the result in the individual case, and for the development of rules and methods, rules that are not only useful as guidelines for those

who must use them, but which are also consistent with the special demands of a country like Canada, where power (especially in the area of private law) is divided among a number of competing provincial "sovereigns". The difference between this approach and that of the Americans is the much more significant emphasis given to the special features of the Canadian federation, particularly the different role played by the Supreme Court of Canada when compared with that of the United States Supreme Court.

Such concerns can easily be seen as involving a direct contradiction. It is often thought that either one has no rules and regards fairness and justice as the dominant or governing goal, or one has rules and one lives with the impact that their application might have on an individual in a concrete case. It is, we believe, very important to deny, and to demonstrate the validity of the denial that such a contradiction exists. Rules have no justification unless their application in the individual case is fair and forwards identifiable social policies. Fairness has no content unless it contributes to the development of predictively useful rules. Never forget that as Holmes said: ("The Path of the Law" (1897), 10 *Harv. L. Rev.* 457)

> It is revolting to have no better reason for a rule than that so it was laid down in the time of Henry IV.

In the context of Canadian conflicts we need only exchange "Henry IV" for "the nineteenth century" or "*Dicey & Morris*".

This is strong language. But remember that Holmes said only that it is revolting to have "*no better reason* . . .". He did *not* say that the mere fact that the rule is ancient is a reason for rejecting it. Similarly the mere fact that a particular conflicts rule is enshrined in *Dicey & Morris* does not mean that it is necessarily wrong. What Holmes meant was that no rule justifies its application merely by existing. We must always ask, "Does the application of this rule make sense (i.e., forward some identifiable social policy, conduce to fairness, etc.) in the context of this particular case, and in the light of the third of the questions set out above, in the context of the demands of Canadian federalism?" This question is not, and cannot be answered by the ritual incantation of any rule.

We shall be able to postpone the examination of the issues of Canadian federalism until later in the course. For the moment we shall focus on the first two questions that were posed, and on the first part of the question that has just been asked.

It is part of the purpose of this course to show you what the courts and academics are now doing in conflicts cases. This is an extremely important part of the course. It is essential to know the basis from which the courts are likely to reason, or, at least, to begin to reason. We start, therefore, by examining in each area of the course the traditional and generally accepted rules. Once these have been explored it is both possible and profitable to explore the issues raised by the cases more fully.

The course materials deal principally with four areas of law in which conflicts problems arise:

the substantive areas of contracts and torts and the procedural issues of jurisdiction and the recognition and enforcement of foreign judgments. The problems are by no means limited to these areas, however, and there are many other areas where interesting developments are occurring. These areas include corporate law (for example, securities, anti-trust law), commercial law (or more specifically, conflict of laws and the law of international sales, secured transactions, bills of exchange or letters of credit) and international bankruptcy or insolvency—as the insolvency of the Maxwell and Reichmann groups vividly illustrate.

4. NOTE ON UNIFORM LAWS

An important recent development that will not, however, be extensively explored in this course, are various proposals to produce an international uniform law on certain topics. It is generally accepted that conflicts problems would disappear if there were uniform rules in all relevant jurisdictions. (The validity and effect of this assumption will be more closely examined later. The automatic acceptance of both the assumption and the desirability of uniform laws is one of the more difficult problems we face in developing our approach to Conflicts.)

There is, of course, uniformity of laws in many areas of the law. In Canada, all the common law provinces have *Sales of Goods Acts* that are very nearly uniform.[6] Similarly, the *Uniform Commercial Code* in the United States largely eliminates conflicts problems in those areas where the Code applies. There are places where the Code specifically includes express conflicts rules, and we shall look at some of those more closely later.

More ambitious proposals have led to international conventions dealing with certain specific issues. There is, for example, a convention dealing with the problem of international disputes between the parents over the custody of children: *Convention on the Civil Aspects of International Child Abduction* to which Canada and (as of January, 1993) twenty-two other countries are signatories, and which is part of the statutory law of all Canadian provinces (see, *e.g.*, *Children's Law Reform Act*, R.S.O. 1990 c. C.12 and *Child Abduction Act*, R.S.N.S. 1989, c. 67). There are a variety of these Conventions. They are known as "Hague Conventions" because they are the result of multinational negotiations conducted at the Hague in The Netherlands. An aspect of these negotiations has been the effort to draft international uniform rules for sales of goods. These efforts go back to 1930 when the International Institute for the

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[6]Proposals to change the act are unlikely to be implemented by one province without an understanding from each of the others that their acts would be similarly changed. The recommendations of the Ontario Law Reform Commission regarding the *Sale of Goods Act* were taken up by the Uniform Law Conference of Canada which produced a draft act for enactment by all the provinces that differs from the original Ontario proposal. See *Report of the Ontario Law Reform Commission on Sale of Goods*, 1979 and *Uniform Sale of Goods Act*, Proceedings of the Uniform Law Conference of Canada, 1981. The Uniform Law Conference of Canada has had a continuing interest in the problems of the Conflict of Laws and has produced a number of draft acts, some of which have been adopted as solutions to various conflicts problems. See. e.g., the *Reciprocal Enforcement of Maintenance Orders Act* in its various forms in the Proceedings of the Conference over many years and, more recently, the *Uniform Enforcement of Canadian Judgments Act*.

Unification of Private Law (UNIDROIT) began work. In 1964 two conventions were adopted: a *Uniform Law on the International Sale of Goods* (ULIS) and a *Uniform Law on the Formation of Contracts for the International Sale of Goods* (ULFC). Neither Canada nor the United States has signed these conventions. Both conventions have been subject to revision under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). A draft *United Nations Convention on Contracts for the International Sale of Goods* (popularly called, the "Vienna International Sales Convention") resulting from the work of UNCITRAL was adopted in April, 1980, and Canada has now acceded to it. The provinces have to enact any legislation to implement the Convention for it to become law in Canada for only the provinces have jurisdiction over sale of goods. Ontario enacted the *International Sale of Goods Act, 1988*, S.O. 1988, c. 45, (now R.S.O. 1990, c. I.10) and the Convention is law in Ontario. It came into force on May 1, 1992. We refer briefly to some of the more important consequences of the Convention at the end of this section of the Materials. UNIDROIT has remained active in other areas of commercial law. Recent proposals to deal with the *Uniform Law on Independent Guarantees and Stand-by Letters of Credit* and a "*Legal Guide on International Countertrade*" are being considered by the Federal Government. The implementation of these too will probably require provincial legislation.

Apart from these general conventions (which are intended to be of nearly universal application) there are more limited international arrangements based on bilateral treaties and other special arrangements.

Other international organizations whose work has a bearing on some aspects of the conflict of laws include the International Chamber of Commerce. This body has a significant role to play in many international arbitrations. These materials cannot explore these issues in any depth, though as we have already mentioned, we shall briefly consider the impact of some recent developments in international arbitrations. A very recent development that will be explored later is the introduction (through provincial law) of the *United Nations Arbitration Convention* of 1958, more usually known as the New York Convention on Foreign Arbitral Awards (because the United Nations Headquarters are in New York). The adoption by Canada (accession by Canada to the Convention requires, under the *Constitution Act, 1867*, the agreement of the provinces to introduce the enabling legislation) may have a significant role both on the incidence of international arbitrations taking place in Canada, and on the general rules for the enforcement of foreign arbitral awards. Legislation has been enacted in all provinces to implement this convention. See, e.g., the *International Commercial Arbitrations Act*, R.S.O. 1990, c. I.9 and R.S.N.S. 1989, c. 234. The *Arbitration Act, 1991*, establishes (s. 50) new rules for the enforcement in Ontario of the arbitral awards made by arbitrators in other provinces.

It is obvious that political and economic organizations like the European Community and the Canada - U.S. (or Canada - U.S. - Mexico) free-trade agreements will have a very significant role to play in many areas of the conflict of laws. Again, we cannot explore these issues here, though one important consequence may be noted. The decision of the United Kingdom to join the European Common Market has had an indirect effect on the development of some of the rules we will be examining. Much British legislation and many English cases are now based on

European models rather than on common law ones, and are of less relevance to Canada and, more generally, to North America. Since a large proportion of Canadian conflicts rules are based on English law, Canadian courts have been accustomed to looking to the English courts for guidance. That source of help is becoming increasingly less useful, and indeed, in one recent case before the Supreme Court of Canada has been strongly repudiated.

We have mentioned the existence of the Uniform Law Conference of Canada as a body that has a continuing interest in developing solutions to the problems of the Conflict of Laws in Canada. (In its earlier manifestation it was known as the Conference of Commissioners on the Uniformity of Legislation in Canada.) The Conference is composed of representatives of the provincial governments and meets annually. It has managed to work for a long time without attracting any attention of any kind. That body has produced a number of draft uniform acts some of which have been enacted by the provinces. We have mentioned the *Reciprocal Enforcement of Maintenance Orders Act* as one example of its work. This legislation was needed if there was to be a chance of any kind of effective enforcement of maintenance orders interprovincially or internationally for the common law rules were completely inadequate. There is a closely analogous act, the *Reciprocal Enforcement of Judgments Act* which does not have as serious an impact on the common law. The *Reciprocal Enforcement of Judgments Act* may be replaced by new legislation, the *Uniform Enforcement of Canadian Judgments Act* and British Columbia has recently introduced new legislation. We shall look at the existing act and its proposed replacement later. Apart from the *Reciprocal Enforcement of Maintenance Orders Act* and the *Reciprocal Enforcement of Judgments Act* (which all the common law provinces have adopted, though not always in identical drafts) there are other important uniform acts. One of the most important is the uniform *Insurance Act*. The uniformity of the provisions of the provincial acts is achieved by the annual meeting of the provincial Superintendents of Insurance. Uniform legislation is desirable to make the operation of the "pink slip" system of interprovincial automobile insurance work. That system operates across North America, though the uniform provisions only apply in Canada. The existence of a radically different regime in Québec creates, as we shall see, considerable difficulties, and from the insurers' point of view, offers certain plaintiffs opportunities for what the economists euphemistically call "strategic behaviour", i.e., the chance to profit—to obtain a consumer surplus—from litigation.

The development of uniform laws is one that may be expected to accelerate in the future, but the final form of the law may not be quite as is envisioned by the various draft conventions. Uniformity may be achieved by the fact that some laws are tending in the same direction:

A. the introduction into Canada of legislation, like the *Personal Property Security Act*, R.S.O. 1990, c. P.10, the *Personal Property Security Act*, S.A. 1988, c. P-4.05, the *Personal Property Security Act*, S.B.C. 1989, c. 36, the *Personal Property Security Act*, R.S.M. 1987, c. P35, and the *Personal Property Security Act*, S.S. 1979, c. P-6.1. based on Art. 9 of the Uniform Commercial Code of the United States;

B. other legislation based on other parts of the U.C.C., e.g., Art. 8 and the Ontario

Business Corporations Act, R.S.O. 1990, c. B.16, and the *Canada Business Corporations Act*, R.S.C. 1985, c. 44);

C. the coincidental development of similar rules for international contracts, the *International Sale of Goods Act*, for example, in a wide range of countries; and

D. the development common commercial standards through the widespread use of international arbitration and the use of standard contract forms[7] for international transactions.

Regardless of these developments (which are, in any case, mainly confined to commercial law) the common law rules of the conflict of laws will remain important, and the examination of them and of the underlying problems that they create will fully occupy our time.

It is obvious that what we shall study in conflicts is closely related to many issues in International Law. As has been mentioned, an alternative term for conflicts is "Private International Law" as opposed to "Public International Law". No strict division between the two kinds of international law is possible, for at many points in the area covered by Conflicts there are international conventions and other evidence of the effect of international views on the propriety of certain actions by states. Several events have led to very public and very vivid examples of the kind of problems that are included in the area of conflicts. Among them can be found the Uranium Cartel and its aftermath, the Entebbe hi-jacking, the "Ocean Ranger" disaster, the Bhopal tragedy, some awkward problems for Canadian banks in dealing with bank secrecy laws and significant problems in the securities industry and the extent to which the supervisory role of the Ontario Securities Commission, or that of the Securities and Exchange Commission, can extend beyond the boundaries of the province or the United States: see, e.g., *Fortune Magazine*, 22 December, 1986, p. 38. The advent of "free trade" between Canada and the United States is likely to increase the frequency of conflicts cases as the amount of trans-border trade increases.

As we shall see, there is the over-arching problem of the role of constitutional law and of the nature of the federal system in the development of solutions to conflicts problems in Canada.

5. WHAT IS A "CONFLICTS" PROBLEM?

There is a widespread belief, sometimes held by law students, that a client walks into a lawyer's office with a label on his or her forehead saying, "I have a torts case", or "I have a contracts case". The nature of any case is, of course, determined by the way in which the lawyer drafting the pleadings chooses to put his or her client's case. As a matter of practice, there are of course, obvious labels to attach to certain complaints made by a client. A client who states that

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[7]Though the empirical data is scarce, a quick review of many cases decided by the English courts—London is a centre of international litigation—would suggest that most contracts for the international sale and transport of grain, oil and other bulk commodities are based on standard form contracts drafted by trade associations.

she or he was injured in a motor vehicle accident will almost always present a torts case, and little thought is required by the lawyer when deciding how to draft the pleadings after hearing such a story. Other cases are not so clear. You are already familiar with the option that the lawyer may have to put a case of professional negligence or negligent misstatement on either contract or tort grounds. This option exists at the moment the client explains the problem to the lawyer, and may last until the court gives judgment. The existence of the options open to a lawyer when he or she first has to decide what textbook or volume of the *Canadian Abridgement* to turn to is obvious. How long the option lasts is a function of the rules of pleading, and the existence of any rules that require a party to make a case on one of the available grounds.

What is important to remember is that the "labelling" process is *not* automatic: it is the exercise of a choice that the lawyer has in how the client's case is to be presented. This choice must be exercised creatively, for the lawyer who cannot see that a choice exists may not see the strongest argument for her client. The ability to make creative choices is the product of an informed imagination, and such an imagination is perhaps the most significant mark of the good lawyer.

We have said that a conflicts case is any case that presents geographically complex facts. How then does a conflicts case come before the courts? The conflicts issue arises from the pleadings in exactly the same way as any other issue. The lawyer drafting the pleadings on behalf of either the plaintiff or defendant will decide that his or her client's case will benefit from the allegation that there are geographically complex facts that are relevant to the court's decision. Just as the lawyer pleads that a contract was made which the defendant has breached, so the lawyer pleads that there are facts which indicate that the court should do something which it would not do if there were no such geographically complex facts. No conflicts issue arose in *Tilden Rent-a-Car Co. v. Clendenning* (1978), 18 O.R. (2d) 601, 83 D.L.R. (3d) 400 (C.A.) because counsel for each party chose not to allege in the pleadings in the original County Court action that the British Columbia facts were relevant. As we shall see, there may have been good reasons for that decision—reasons that would apply equally to each party.

The lawyer who chooses to allege that there are "foreign" facts may, of course, be unsuccessful in convincing the court that the foreign facts either exist or are relevant—the court may refuse to believe the witnesses who testify to the existence of a foreign fact, or the court may decide that the facts are as the pleadings allege, but that those facts have no bearing on the decision that the court believes is called for. In short, there is nothing about a conflicts case that is not present in any other case. It is only after the court has found that the foreign facts alleged in the pleadings exist and are or are not relevant to its decision that the problems we shall examine begin.

The following is an example of a typical statement of claim, statement of defence and reply. (Parts of each document have been omitted, particularly that part of the Statement of Claim that now constitutes the equivalent of the former Writ of Summons in Ontario.)

PART A

I. CHOICE OF LAW

Chapter 1

1. INTRODUCTION

In the general introduction to the materials it was stated that the problems of the Conflict of Laws could be summarized in three questions. Those questions were:

> 1. In what circumstances should the presence of geographically complex facts influence the decision of the court before which the plaintiff has brought its claim to take jurisdiction to determine the controversy?
>
> 2. What response does (or should) the court make to a claim presented by a party based on a judgment of another court in that party's favour? Does it (or should it) matter if that "foreign" judgment is that of another Canadian court or of a court of a foreign country? Does such a foreign judgment prevent further action in a province (or in Canada) arising out of the same facts? Does the judgment in favour of the plaintiff in the original proceedings give a cause of action to that party before a provincial court so that the foreign judgment can be "transformed" into a judgment of the local court on which a writ of seizure and sale may issue?
>
> 3. In what circumstances, if any, should the presence of geographically complex facts induce a court to consider determining the controversy by reference to some other law or rule of decision than that of the province in which the court before which the plaintiff has brought his, her or its claim is situated?

The first of these questions we can refer to as the issue of judicial jurisdiction. The second question is referred to as the issue of the recognition and enforcement of foreign judgments. Recognition in this context refers to the giving of effect to a declaration of a foreign court that some legal controversy has been resolved in favour of one of the parties litigating before that foreign court. The most common situation where the recognition of the judgment of a foreign court is in issue is whether it has validly dissolved a marriage by a decree of divorce, so that the parties are, for example, free to remarry in a Canadian province. This question may be relevant because one of the former spouses has remarried in reliance on the foreign decree, and the validity of that marriage is now in issue. Enforcement is the transformation of a foreign judgment into a claim that is recognized as valid in the province and on which, after judgment or some more speedy procedure, execution can be levied against the defendant's property. "Foreign" in the context of these rules means, as we have mentioned, any jurisdiction that is

separate from that of the recognizing or enforcing court. Under the rules in this area of the law one province is as foreign to another province as is some truly foreign country such as France or Afghanistan. We express the same idea by saying that, for the purposes of the conflict of laws, and in respect of those matters that are governed by provincial law in any of its manifestations, Ontario and Saskatchewan are separate jurisdictions.

In respect of those matters that are governed by federal law (under the *Constitution Act*, 1867, s. 91), Canada would be a single jurisdiction, and the separateness of the provinces (again under the *Constitution Act*) would be irrelevant. This consequence does not always follow. In creating the rules for determining where petitions for divorce could be heard under the 1968 *Divorce Act*, the federal parliament chose to make the separateness of the provinces relevant. Under the *Divorce Act* the requirements that justify the courts of a province taking jurisdiction to decide the dispute are set out. The need to use the provincial courts to hear petitions for divorce arose because there was no federal court with jurisdiction to hear such petitions[1].

The third of these questions is known as the choice of law question. In practice it is the most important and the most difficult to determine. The rules that are accepted as governing the other two questions are well established (though that fact should not lead you to fall into the trap of thinking that they do not present grave problems for the courts or for lawyers who must plan around them). In contrast, the rules governing the choice of law issue are much more open to argument and are much more difficult both to determine and apply. The questions raised by the choice of law issue are some of the most intractable problems that you are ever likely to run into in the law. We start our examination of conflicts by examining the choice of law process.

2. THE CHOICE OF LAW PROCESS

The issue raised by the choice of law question may be stated in the following way:

> If a Canadian court does exercise judicial jurisdiction to hear a case in which there are allegations in the pleadings that a foreign law has an impact on the decision that the court should reach, what rule of decision does it apply? Does it apply its own law, i.e., the law of the province where it is, (or in a matter to which federal law applies, Canadian law) or the law of some other place, and if it does decide to apply the law of some other place, how is that place to be determined?

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[1]When the *Divorce Act* was first passed in 1968, the courts of Québec and Newfoundland did not have jurisdiction under provincial law to hear petitions for divorce. People in those provinces who wanted to get divorced had had to seek a private act of the federal parliament dissolving their marriage. The new act, for the first time, made judicial divorce available in all the provinces. To deal with the problem created by the situation in Québec and Newfoundland, the act provided that the Federal Court of Canada would hear petitions from those provinces. Before the act came into force, both provinces had amended their legislation to permit their courts to hear petitions for divorce.

It is obvious that the geographically complex facts may not be limited so as to implicate in the decision the law of only two jurisdictions: the case could have connections with two or more jurisdictions. A marriage or succession case, for example, may make relevant the parties' entire lives and many jurisdictions may arguably be relevant to the question the court has to decide.

As you could see from the pleadings set out earlier, the issue in that case was one of choice of law. The defendant stated that the contract had to comply with Spanish exchange control regulations, and of course, the plaintiff denied it. What is the basis for the defendant's argument that the law of Spain is relevant to a dispute brought before the Ontario High Court?

A simple (*not* a simplistic) view of the law might assume that an Ontario court, or any other court, by applying its own domestic rule of decision to the issue of the liability of one contracting party to the other, would be as able to be just, fair, or competent to meet any other required standard as any other court applying its domestic rule of decision. Why then should the Ontario court abandon its domestic rule of decision and adopt that of Spain?

Notice that we have to be very careful of the terminology that we use. We refer to a "domestic rule of decision" to indicate the rule that would be applied by the court if there were no relevant foreign facts of any kind—as if the whole matter had arisen with an exclusively local focus. If we were to refer to "Ontario law" or to "Saskatchewan law" in those terms we create a risk of being ambiguous, for those phrases, given what was said about the question of the relevance of foreign law being determined by the law of the province where the court is situated (*supra*, p. ?) may be taken as referring to the local provincial law *including its choice of law rule*. The existence of such ambiguity begs the question we have to decide. If a reference to provincial law were to include the choice of law rules of the province, then of course, *all cases coming before the courts of that province would be dealt with by provincial law* and a conflicts case is decided by provincial law in exactly the same way as a case in which there were no relevant foreign facts would be: we have simply stated what is a tautology. The phrase "domestic rule of decision", though cumbersome, is at least accurate and faithful to the distinction we are trying to draw.

We shall see that one of the most awkward problems we face is the need to be completely accurate in how we refer to the law applied in a wholly domestic case, and to the law that might incorporate resort to some foreign law because our choice of law rules have made that law relevant.

The argument that a court would be justified in applying its own domestic rule of decision in all disputes that come before it is a powerful argument. It is hard to deny that any court will reach a "just" result by applying its own domestic rule of decision. Consider for a moment the consequences of the denial of the truth of that statement. Its denial forces one to argue that the decision of an Ontario court applying Ontario law is not a just decision. If this argument is sustained in some sense, what happens now in a case in which there are no foreign facts? Is the decision of the court now "just" in some way that was not true in the earlier conflicts case? We

have therefore to be very careful about the language we use and the implications of our usage on such fundamental issues as the nature of a "just" decision.

We have to put the issue raised in a conflicts case so that we do not have to deny that the application of the local or domestic rule of decision is just: we have to argue that *in the special context of the case in which there are geographically complex facts*, a *more just* decision will be, or may be reached by the choice of the domestic rule of decision of another jurisdiction. We can never forget the power of the argument that decisions of Nova Scotia courts applying Nova Scotia law are going to be as just, or will conduce to the achievement of a just result as will decisions of Nova Scotia courts choosing in place of their own domestic rule of decision one of another province or country.

When we are in a position to review all, or a large part of the choice of law rules in conflicts, we shall see that the need to justify the decision to apply some other rule of decision than a court's own domestic one is the heart of the choice of law process. Since it is true as a matter of fact that a court's domestic rule of decision will not be applied in all cases that come before it, and that cases that present geographically complex facts will often be decided by reference to some other rule of decision, it becomes necessary to determine when a court will abandon its rule of decision and rely instead on that of another jurisdiction.

3. THE STRUCTURE OF CONFLICTS ANALYSIS

The most important thing to understand at this stage of the development of your understanding of these materials is the generally accepted structure of the argument that is implicit in the statement that in certain circumstances one provincial court will abandon its domestic rule of decision and adopt that of another. *It is not possible to understand anything about most of the cases in these materials if you are not clear on how an argument regarding the choice of law issue must be structured.*

When counsel have, in the pleadings,

(i) made allegations about the existence of foreign facts,

(ii) about the content of foreign law,

(iii) the court has found *as a fact* that there are geographically complex facts in the case, and

(iv) that proof of the content or terms of the foreign law has been properly made, so that the court could, if necessary, make a finding of the content of that law,

the court must proceed to determine whether that foreign law should be applied by it to reach

its decision in the case.

This last determination may be stated as raising the question, first stated above, *viz.*, whether the foreign law is relevant to the issues before the court.

This structure of analysis or reasoning adopted by the common law to determine the relevance of the allegations of the content or terms of the foreign law, or to provide the justification for referring to it to provide a rule of decision in the case is the following:

1. The first question that the court must ask itself is whether the case before the court is a "contracts" case (as opposed to a torts case, a property case, a bankruptcy case or some other comparable legal categorization). The answer to this question is the result of the process of "characterization". It is the process, in essence, of deciding in what textbook or volume of the *Canadian Abridgement* one would turn to for guidance on the law applicable to the facts as they are described by a client, or of deciding whether to look in the card catalogue in the library under "contracts", rather than some other heading. As we shall see, characterization[2] is crucially important in conflicts analysis.

2. Once the case is characterized as a contracts case, the common law provides that there is a special "choice of law rule" applicable to contracts cases.

3. The modern formulation of the contracts choice of law rule is that a contract is said to be governed by its "proper law". [The word "proper" here means that the contract belongs or relates to that law distinctively (more than to any other) or exclusively (not to any other): *Oxford English Dictionary* "proper" I.2]

4. If we take for illustration the facts alleged in the pleadings set out above, the defendant maintains that the proper law of the contract is Spanish. The argument that the "proper law" is that of Spain cannot be established by evidence, for we are now in the area where the determination of the question before the court *is a matter for the local law*: it is a question of law, not of the facts. As we have stated, the parties will have led (or challenged) evidence of the existence of foreign facts and of the content of the Spanish law. From what the pleadings disclose, the dispute over the question of the rule of decision to be applied is the court's choice of Spanish law or Ontario law as providing the rule of decision. *Notice that it is assumed by the plaintiff that if Ontario law applies, it can succeed on its claim*

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[2]Sometimes the terms "classification" or "categorization" are used instead of "characterization". There is something to be said for using terms that are less obscure than other ones, but the last term is the most common in the literature. Since there is little profit to be gained in our fighting minor linguistic conventions, we shall use "characterization" in these materials to refer to the process of determining the legal category into which the plaintiff's cause of action will be put.

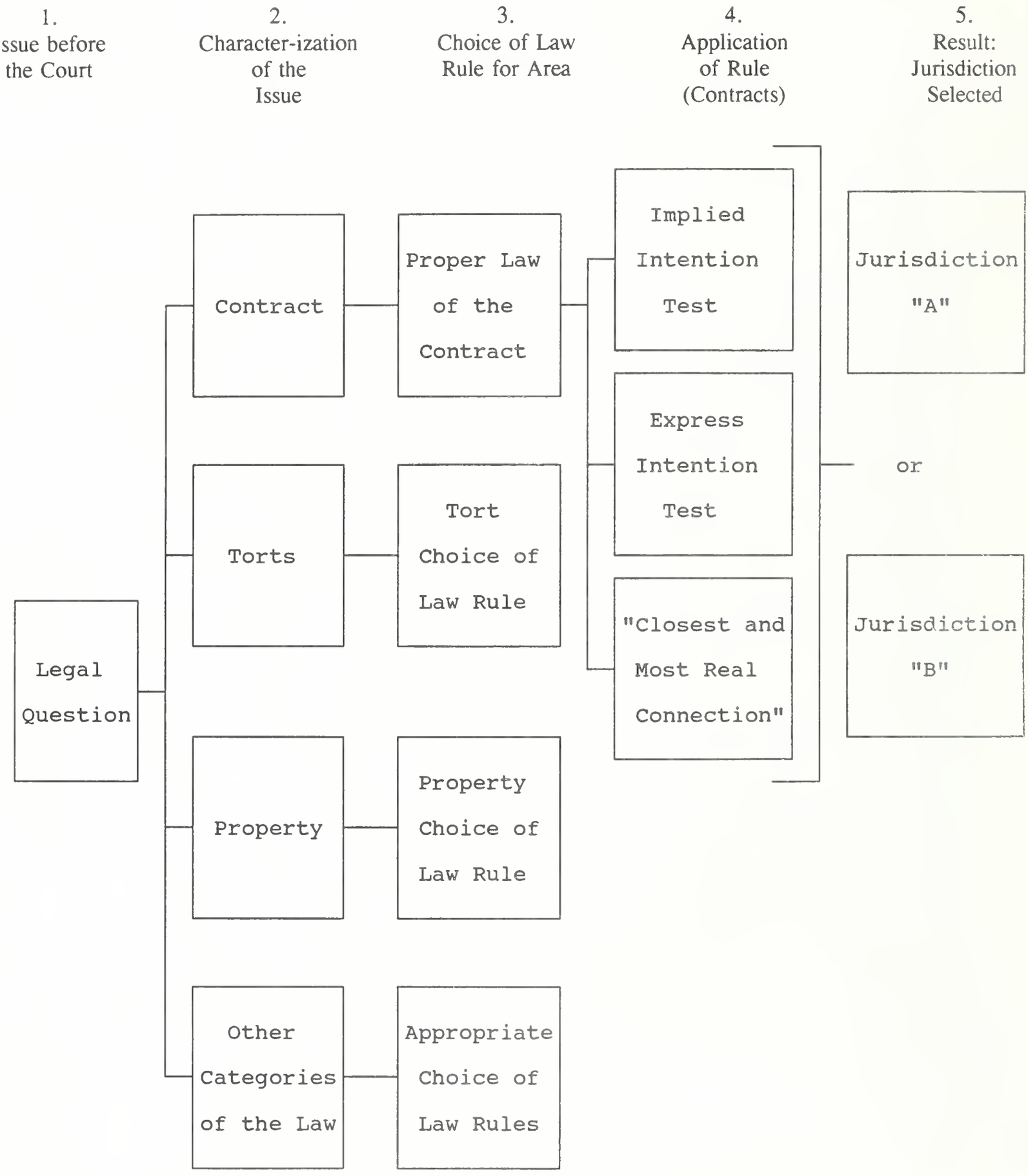
While this dispute centres on the application of Spanish or Ontario law, the dispute could just as easily be whether the provisions of Spanish law or of the law of Québec should apply. In this latter situation, the plaintiff would have had to allege the content of the law of Québec, and would have had to lead evidence of that law by producing for the court experts on that law.

To summarize the issue we can say that the focus of the dispute, under the law of the province where the action is brought, is to determine which of the possibly competing laws will be chosen as the "proper law".

(The various tests for the determination of the proper law are set out in the first case reproduced in the next section of these materials. For the moment it will be simplest if you can accept the statement that the choice of the "proper law" or, speaking more accurately, the identification of it will decide the dispute. The positions taken by each side in the pleadings make it obvious that they have assumed that this determination will dispose of the litigation.)

We can represent the structure we have just outlined in the following way:

Table 1


1. Issue before the Court
2. Character-ization of the Issue
3. Choice of Law Rule for Area
4. Application of Rule (Contracts)
5. Result: Jurisdiction Selected
Legal Question
Contract
Torts
Property
Other Categories of the Law
Proper Law of the Contract
Tort Choice of Law Rule
Property Choice of Law Rule
Appropriate Choice of Law Rules
Implied Intention Test
Express Intention Test
"Closest and Most Real Connection"
or
Jurisdiction "A"
Jurisdiction "B"

The structure that you can see in Table 1 illustrates the crucial importance of characterization, and the resulting automatic selection of a "choice of law rule" to govern each of the various legal categories into which a legal issue can be put.

You will have noticed that there are three formulations of the "proper law test" in column 4. At this stage it is not important that you know precisely what each formulation entails. We shall examine each of them in the next section of the materials. It is only important that you realize that there may be uncertainty about the exact form of the choice of law rule.

This uncertainty exists in the choice of law rules of all other categories of the law, torts, property, etc. We have avoided indicating the form of the uncertainty by simply referring to the "appropriate" rule for each of the categories of the law. We can postpone our examination of the nature of the uncertainty and of its origin until we come to examine each of the areas mentioned.

Any uncertainty over the exact or "correct" formulation of a choice of law rule, i.e., the rules stated in the third column of Table 1, *does not bear on the validity or general acceptance of the structure outlined in the table*. That structure is almost universally accepted by the courts and by most academic commentators as the basis for any analysis of conflicts problems. It is essential that you understand it.

The result of the process of analysis outlined in Table 1 when applied to the facts stated in the pleadings that we set out earlier is that the court will decide whether the law of Spain or the law of Ontario is the "proper law of the contract". We can assume that it might make a difference to the decision if the court adopts one of the tests in the fourth column rather than another, and counsel will argue that the court should adopt that formulation that she or he thinks will most likely result in a decision favourable to her or his client.
When we come to examine each of the tests for the determination of the "proper law" we shall see that each refers to or incorporates certain facts. For example, the "Implied Intention Test" refers to the possibility that an inference can be drawn from the foreign and Ontario facts proved by each party's witnesses that the parties would have chosen to have their contract governed by one law rather than another. The kind of facts that might induce the court to draw the inference are facts that suggest a "connection" between the contract and one of the jurisdictions claimed to be the proper law. Such facts would be the location of the mine from which the royalties will be earned in Spain, the place where the contract was negotiated, where the contract was executed by the parties. We refer to these facts as "connecting factors". They help to "localize" the contract, or in other words, they are relevant under the choice of law rule chosen by the court as the appropriate one determine the proper law.

Once the court has determined which of the available formulations of the proper law it will use, it will consider the various "connecting factors" that will be

offered by counsel as evidence that the domestic rule of decision of one or other of the jurisdictions should be applied to the facts. Generally speaking, the choice of the law, i.e., the domestic rule of decision, of either jurisdiction "A" or "B", will result in the application of that jurisdiction's rule to dispose of all aspects of the dispute. We can speak then of result of the choice of law process as identifying a "governing law" for the dispute. The "governing law" may be either that of the forum, i.e., the law of the place where the action is heard, or of the foreign country. (In some cases, of course, both counsel may agree that the law of the forum is not the proper law, but disagree over which of two foreign laws should apply.) If the foreign law is chosen as the proper law, it will displace the domestic rule of the forum in favour of that of the foreign country.

In this way the domestic rule of decision of the court where the action is begun, in our example Ontario, will be displaced by some foreign rule of decision. This result justifies the importance we attached in the earlier discussion of the need to be very careful in how we state the operation of conflicts rules. Since the Ontario court may have to choose the law of Spain to decide the dispute brought before it, the court cannot make that choice unless at some level of analysis it is prepared to assume that the result of the application of Spanish law will result in a decision that is as just and as fair to the parties as would a decision to apply the domestic law of Ontario.

We say, "at some level of analysis" because we need to be free to examine very carefully the claim that a court can be indifferent to the result of an inquiry that may lead to a dispute's being resolved by the application of a rule that the forum, either through the common law process of law-making or through the local legislative process has rejected as appropriate for cases without any geographically complex facts. We use the word "rejected" in the preceding sentence even though we know that the decision to adopt one rule rather than another is often more a case of acquiescence in the historical evolution of the law than a conscious choice between competing values. How far evolution can proceed without the implication of some set of values is, of course, one of the principal problems of the law, and you will have struggled with the consequences of such "unconscious law-making" in all of your other courses in the law school. It is one of the features of conflicts cases that they bring out issues that often lie deeply buried in ordinary, non-conflicts cases.

The structure of the choice of law process is, as Table 1 shows, generally applicable whatever the problem before the court might be. If the problem is, at the initial stage of the process outlined in the table, characterized as a torts problem rather than a contracts problem the choice of law rule that would be found in columns 3 and 4 of Table 1 would be different. You can understand why in a conflicts case it would be very important to the outcome if a case were regarded as torts case rather than a contracts one. The process of characterization is extremely important to the outcome of a case, and may sometimes be determinative of it.

For example in *Levy v. Daniels' U-Drive Auto Renting Co.*, 143 A. 143 (1928, Sup. Ct. Conn.) the defendant had rented a car to a driver in Connecticut. The driver injured the plaintiff, a passenger in the car, while driving in Massachusetts. If the case were regarded as a torts case, the choice of law rule then applied by the American courts would have led to the application of the law of Massachusetts and the plaintiff would have lost his case. Under Massachusetts law the owner of the car who rented it out was not liable for the negligence of the driver. Under the law of Connecticut the owner would be liable under the circumstances of this case. The law of Connecticut could only be applied if the case could be regarded as a contracts case, so that the liability of the owner could be said to depend on the law governing the contract between it and the driver.

Everything therefore turned on whether the case was characterized as a torts case or a contracts case. The entire argument before the appeal court dealt with whether the trial judge had correctly characterized the cause of action as a contracts case thereby making the defendant liable.

In one sense, learning conflicts is learning what is the appropriate choice of law rule applicable once some particular characterization of the issue under examination has been made either by a court or by yourself in giving advice to a client who is contemplating litigation, or in planning your clients affairs with an eye to the risk of future litigation.

The goal of the choice of law process is usually stated as being the achievement of predictability and uniformity. It is believed that precisely defined choice of law rules will result in predictable results, so that the outcome of any case can be foreseen with some degree of confidence, and plans made on that basis. It is similarly believed that choice of law rules will result in uniformity in that the result in any case will not depend on the place where the action is brought. The validity of and the methods of achieving both of these goals will be considered in the materials that follow.

In considering the issues raised in the preceding paragraph, you might like to keep in mind the story of the hedgehog and the tortoise as told by Rudyard Kipling in the *Just So Stories* in "The Beginning of the Armadillos". You will remember that the Painted Jaguar was confused when he met the hedgehog and the tortoise and was unable to tell which was which. As a result of his confusion, both escaped becoming the main course for his dinner. To make good their escape they both became something different from what they had been. When he told his mother of his meeting with two strange new animals he said,

> "Mother, there are two new animals in the woods today,and the one that you said couldn't swim, swims, and the one that you said couldn't curl, curls; and they've gone shares in their prickles, I think, because both of them are scaly all over, instead of one being smooth and the other very prickly; and besides that, they are rolling round and round in circles and I don't feel comfy."
>
> "Son, son!" said Mother Jaguar ever so many times, graciously waving her tail, "a Hedgehog is a Hedgehog, and can't be anything but a Hedgehog; and a Tortoise is a Tortoise, and can never be anything else."

"But it isn't a Hedgehog, and it isn't a Tortoise. It's a little bit of both, and I don't know its proper name."

"Nonsense!" said Mother Jaguar, "Everything has its proper name. I should call it 'Armadillo' till I found out the real one. And I should leave it alone."

The first part of this course is perhaps best described as being largely about Hedgehogs, Tortoises and Armadillos.

Chapter 2

Choice of Law in Contract

A NOTE ON THE HISTORICAL DEVELOPMENT OF THE CHOICE OF LAW PROCESS

There is a very long history to the choice of law process. A variety of it can be found in Roman law where the *praetor peregrinus* decided disputes, brought before him in Rome, between foreigners on the basis of their own law (as opposed to Roman law). There was a significant flowering of conflicts analysis in the Italian city states between the fourteenth and early sixteenth centuries. Some of the ideas developed at that time continue to have an effect on what we do now, and that effect appears in some odd places. We shall examine some of these examples later in the materials.

For our purposes, the modern development of the process we have outlined in this section of the materials can be traced to the nineteenth century. The ideas developed then are very much still with us. It is one of the most curious features of conflicts analysis that in many respects it is a true anachronism, rather like some very ancient species of animal that has survived to our time with an extraordinarily primitive reproductive or digestive system—some fundamental feature of its anatomy that appears quite anomalous when compared with more highly developed species.

The conflict of laws first emerged as a separate body of law in the works of Joseph Story (1779-1845), who in 1834 published his treatise on the Conflict of Laws. At that time Story was a member both of the United States Supreme Court and of the Law Faculty of Harvard University—"moonlighting" was then regarded as the mark of a competent person, and not as a cause for decanal concern! Story borrowed extensively from European sources, and one of his more significant borrowings was from European and English writing on Natural Law theory. That source permitted Story to state his rules and his structure of analysis with more firmness and infallibility than is or was usual in law, except perhaps for Lord Mansfield, whom later generations loved to prove wrong!

The rules as they were later developed in England were heavily influenced by Story's writing. English texts began to appear in the latter part of the century: Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, 1896 (now *Dicey & Morris*), Westlake, *A Treatise on Private International Law*, 1858 (latest edition, 1925). Since then, the volume of writing by academic commentators has been prodigious. Some of their contributions will be referred to in these materials.

Notice that the first texts were written in England at about the same time as the first texts on Contracts, Torts, Jurisprudence (for law students) and Constitutional Law (in the English sense) were appearing. The philosophical basis for all of this writing was the prevailing view that law *was* (*not* should be) a set of logically consistent propositions; that lawyers should strive to be

"scientific", and that law was a "science". The intellectual justification for these claims was the perceived power of science and the "scientific method" and the consequent desire of those writing about law to hitch their wagons to its rising star, and to claim to be in the forefront of intellectual inquiry.

We now associate this view of the basis for law with "Formalism", and we contrast it with the views of, e.g., the "Realists": writers like Llewellyn, Morris Cohen and Jerome Frank. It is one of the major sources of the problems we shall face that the texts on Conflicts seem to be caught in some kind of time-warp where, though the rest of the law (as evidenced by the decisions of the courts and academic writing) has generally rejected formalism, in Conflicts alone formalism remains the dominant theory. As a result, the Canadian judicial and academic approach to conflicts is truly an anachronism.

The process or structure of choice of law that has just been outlined has generally been followed in contracts cases since contracts choice of law rules were first developed. Table 1 (*supra*, p. ?) suggested that there are three possible formulations of the "proper law": the implied intention test, the express intention test and the "closest and most real connection" test. As we shall see, while there is a dispute over which of these three tests should be used (though it will become fairly clear that the last one is the one most often accepted), there have been other tests that have been adopted in some of the earlier cases. These older rules and attitudes find an echo even now.

The earliest formulation of the contracts choice of law rule was that the contract would be "governed" by the law of the place where the contract was made. This rule expresses the structure and principal characteristics of all traditional choice of law rules: the use of the word "governed" denotes the scope of the choice of law rule—the choice deals with all aspects of the contract, its validity, enforceability and the plaintiff's entitlement to damages—the focus on an objectively ascertainable jurisdiction through the use of the particular "connecting factor" (the place where the contract was made—called in Latin, the *lex loci contractus*[1]) implies that the choice would be made in the same way regardless of the place where the action was brought. This feature of the rule would ensure, so it was believed, that at least the goal of uniform results regardless of the plaintiff's choice of forum would be achieved.

This particular choice of law rule was originally a generalization of a rule first articulated in a case involving the validity of a marriage: *Compton v. Bearcroft* (1769), 2 Hag. Con. 444n, 161 E.R. 799. It was accepted that as marriages were in essence contracts, so a rule designed to

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[1]This phrase may be literally translated as "the law of the place of the contract". It is now usually translated as "the law of the place where the contract was made". (The latin word "contractus" is a fourth declension noun, and the "u" sound is long, as in "chocolate mousse".) The abbreviation, *l.l.c.* is often used as a convenient shorthand form.

deal with those contracts could be applied to all contracts, commercial contracts as well as those which we now think are the antithesis of a commercial arrangement. The equation of marriages and commercial contracts which is still being made in some of the cases and texts published very recently is one of the curious features of conflicts. It derives from one of the principal features of the traditional choice of law system: broad rules of wide application that are applied without thought to the possibility that the context may vary from application to application. We do not claim that modern pre-nuptial agreements are not largely about money, but that it is unlikely that problems of a "marriage" contract will be satisfactorily dealt with by rules that ignore the special circumstances that gave rise to that contract. Ideas of mistake, frustration and of the remedies for breach natural in the commercial context fit very poorly into the context of a marriage contract.

While the importance of the law of the place of the making of the contract has declined in importance in the choice of law issue, and is no longer accepted as the sole determinant of that issue, it remains important in some other respects. The rules of court of most Canadian provinces (See, e.g., Ontario *Rules of Civil Procedure*, Rule 17.02 (f)(i)) provide that a provincial court may take jurisdiction against an absent defendant when the action is in respect of a contract "made in the province". The rules for determining *where* a contract is made are provided by the traditional rules of offer and acceptance of the common law. The rule is that a contract is made where the last act necessary to make the contract occurs. To find this place we plug in the rules of offer and acceptance. These rules tell us that, in general, a contract is made when the offeror receives notice that the offer has been accepted. This rule applies in the case of any instantaneous communication, e.g., electronic mail, telephone or telex: *Entores Ltd. v. Miles Far East Corp.*, [1955] 2 Q.B. 327, [1955] 2 All E.R. 493, (C.A.). (Is a fax transmission more like a mailed letter than an oral communication?) It is accepted that a contract is made in the place where the offeror is if the rule that applies is that the contract is made when the offeror receives notice of the acceptance.

When the contract is made by mail and the "postal acceptance rule" applies, the contract is made when[2] and where the offeree puts the acceptance into the mail. If, however, the offeror has put the risk of using the mail on the offeree, the contract will be made when and where the offeror *receives* notice of the acceptance. A case raising these issues is *Brinkibon Ltd. v. Stahag Stahl und Stahlwarenhandelsgesellschaft mbH*, [1982] 1 All E.R. 293 (H.L.). (To anticipate a problem that we shall come to later, it is worth observing that it is unclear, to say the least, why the result of the kind of technical game-playing that goes on in these cases should have any relevance to either the suitability of the particular court to hear the case, or the fairness of a decision that an absent defendant should be required to answer the plaintiff's allegations in that

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[2]The original rules were only concerned with *when* the contract was made. This determination had, of course, the direct effect of allocating the risk of loss arising from the chance that the letter sent by mail might not be received by the addressee. No person now uses the mail to make contracts of any but trivial kinds: the risk of loss is simply too high. The risk allocation function of the original rules is now entirely forgotten, and when the inquiry is into the place *where* the contract is made the context of the original rules is entirely forgotten. This feature of conflicts is why we say that the rules are applied without thought for the context.

court. The only substantive issue raised by the rule is the need for solicitors to know what has to be done, so that they can be confident in advising their clients.)

The general rule for choice of law in contracts, that the contract was governed by the law of the place where the contract was made was accepted for about 100 years after *Compton v. Bearcroft*, that is, until the rise of the "will theory" of contracts. This theory made the intention to be bound by a contract or by any other kind of consensual arrangement of more importance that the objective feature of the place of making. In commercial contracts, therefore, the proposition that a contract is governed by the law of the place of making was replaced by other formulations. It should be noted, however, that like many features of the eighteenth century law, their replacement by the newer ones of the nineteenth was haphazard and spotty and was never completely achieved. We shall see the place of contracting as the governing determinant of the choice of law rule being applied in Canada as late as 1933. The rule was accepted in the United States as the general rule in 1934 in the *Restatement, Conflict of Laws*, (i.e., the first Restatement). It was accepted in the United States until the general disenchantment with the Restatement resulted in the adoption of another rule, or other rules, the form and content of which we shall very briefly note later.

Once the place of contracting (the *l.l.c.*) was rejected as the principal determinant of the choice of law rule in contracts cases a number of alternative formulations were adopted in both the cases and texts. These different choice of law rules include the following:

1. The law of the parties' domicile (*lex domicilii*). The word "Domicile" roughly corresponds with a person's home.

2. The law of the place where the contract is to be performed (*lex loci solutionis*).

3. The law implicitly[3] chosen by the parties.

4. The law expressly chosen by the parties.

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[3]There is a fundamental difference between the words "implied" or "implicit" and the word "inferred". The rule we have stated is in the form in which it is usually expressed. What those who use the rule mean is that the court can *infer* from the contract and the surrounding circumstances what was *implicit* in it, or what was left by the parties as an *implied* term of it. A court can really only focus on the process of inference: that process is an external point of view. The contract may contain terms that may be implied, that is, added to those terms that are expressly stated. The use of implied terms must be seen as a kind of internal point of view. The parties know that their agreement must contain terms that are not expressly stated, and they are content to leave the agreement in this "incomplete" form. Most agreements are incomplete in this way because it is beyond the parties' resources to express their intentions on every conceivable point that might need to be later spelled out with some precision. Agreements that are 500 pages long are too expensive to draft.

5. The law or the forum, i.e., the law of the place where the court is sitting.

6. The law with which the contract has its "closest and most real connection".

This last phrase, as we shall see, is the most modern formulation of the choice of law rule for contracts, but its origin is distant: it has been referred to for a long time, i.e., about a century. Like many legal concepts, it comes complete with its unexamined and endlessly repeated pleonasms. Do not attempt to discover what the difference is between "closest" connection and "most real" connection. In that attempt lies either certain insanity or the final passing of all that remains of the time when lawyers were paid by the length of the document. It is as much use to investigate the difference between these two phrases as there is in attempting to do the same with the phrases, "to have and to hold", "null and void" and other similar examples.

All of these formulations can in one sense be referred to as the "proper law" of the contract. The term "proper law of the contract" as used in this list is a different rule from the others. That formulation of the choice of law rule makes all of the other factors relevant, but unlike the rule that the law of the place of the making of the contract determines the governing jurisdiction, it takes all these "connecting factors" and uses them to discover if, out of all the jurisdictions with which the contract is connected, i.e., all the geographically complex facts surrounding the making and performance of the contract, one jurisdiction is of predominant importance. As we have mentioned, a connecting factor is a concept like the *lex loci contractus*, or the other factors in the contract, its making and performance which connect the contract to a particular place. (It is important to remember that a "place" is relevant for conflicts purposes when it is a separate jurisdiction so far as the law of contracts is concerned. In Canada, the relevant places are the provinces and territories for those are separate jurisdictions for contracts purposes. (*Constitution Act*, 1867, s. 92(13)). In other cases, e.g., those involving bills of exchange, the relevant jurisdiction would be Canada (*Constitution Act, 1867*, s. 91(18)). One way of expressing this difference would be to say that there can be no relevant geographically complex facts as regards a cheque issued in Ontario and drawn on a bank in British Columbia. A case arising out of such a transaction would not be, under the definition used here, a *conflicts* case.

All of the formulations of the proper law have obvious problems: if we refer to the parties' domicile, what if their domiciles are not the same? What about a contract that is to be performed in more than one place? What evidence would support an inference that the parties had chosen one law over another? These are the questions we will examine in the cases and materials that follow. The first case explores the modern formulation of the "proper law".

The appeal should therefore be allowed, and judgment entered dismissing the action.

In view of the fact that the defendant has enjoyed the benefits of the transaction which was entered into as a favour to him, there should be no costs to the defendant of the trial or the appeal.

NOTES

I. As was mentioned earlier, the determination of the content of any foreign law is a question of fact. It is proved by expert witnesses. As the judgment of Porter, C.J.O., indicates, only a person who is entitled to practise law in the jurisdiction is entitled to give evidence as an expert. (Academics and judges from the foreign jurisdiction are occasionally, as a mark of especial favour and esteem, allowed to appear as experts in some foreign law.) The origin of this rule is, once again, distant. It arises out of a legal system that existed in a state which differed from Canada and with an attitude to law which we no longer hold. As we have said, the origin of our conflicts rules was English law. England is regarded as unitary state—to the occasional rage of the Scots—even though the separateness of the Scottish legal system gave the law of the United Kingdom some of the aspects of a federal state. English law, i.e., the common law, has exhibited over the centuries more than a little xenophobia. The common law has often been proud of its independence of the contagion of the Roman law. This independence is frequently obvious in judgments on issues of procedure, and matters of evidence are often the essence of procedure.

II. It is odd, to say the least, that an Ontario judge can look at a case from Nova Scotia or British Columbia (as is done every day) to find out what *Ontario* law might be, but not for the purposes of finding out what *Nova Scotia* or *British Columbia* law might be. A trial judge who says that she can read Nova Scotia cases and statutes as well as or better than the expert called to testify on Nova Scotia law may get her knuckles rapped by the Court of Appeal. (See, e.g., *Lear v. Lear* (1974), 5 O.R. (2d) 572; 51 D.L.R. (3d) 56 (C.A.)). The absurdity of requiring expert evidence of Ontario law in a Nova Scotia court, and *vice versa* has been recognized by amendments to the *Evidence Acts* of several provinces. See, e.g., the *Nova Scotia Evidence Act* R.S.N.S., 1989, c. 154, s. 3(3), the Manitoba *Evidence Act*, R.S.M., c. E-150, s. 31 and the British Columbia *Evidence Act*, R.S.B.C., 1979, c. 116, s. 26. Ontario, Alberta and Newfoundland have no such provisions, though recommendations for such a change have frequently been made. Even in provinces which have provisions in their evidence acts requiring courts to take judicial notice of the statutory law of other provinces the courts have not construed those provisions widely. It is still incumbent on one of the parties to raise the issue of the possible applicability of foreign law. Courts do not take judicial notice of the statutes of other provinces in the way that they can take judicial notice of their own province's statutes (i.e.,

by considering those statutes even though the parties may not have pleaded them). See *Archie Colpitts Ltd. v. Grimmer* (1978), 27 N.S.R. (2d) 341, 41 A.P.R. 341, 83 D.L.R. (3d) 281, (N.S.S.C., A.D.).

III. The choice that the court faced in *Etler v. Kertesz* was whether the law of Switzerland or Austria *governed* the problem facing the court. As we saw, the answer to this question was determined by asking which jurisdiction had "the closest and most real connection" to the transaction. This question was answered by considering the geographical facts surrounding or arising in the transaction. The rule that one drives from *Etler v. Kertesz* is that the determination of the "proper law" in a *contracts* case is to be made by considering the jurisdiction with which the contract has its closest and most real connection.

IV. Because the choice of law rules for torts or any other area are different, it becomes extremely important to know whether we are dealing with a contracts case or some other kind of case. Porter, C.J.O., does not have to worry much about the problem of "characterizing" the case as a contracts case: he more or less assumes that the contracts approach is the right one. As was emphasized in the Introduction to the choice of law process in Chapter 1, this process of characterizing or classifying the problem is, of course, an integral part of any thinking about law. A lawyer has to know, for example, whether he or she looks in the *Canadian Abridgement* or one of the digests under "Contracts" or under "Criminal Law" for the answer to the problem. When the process becomes, not a way of organizing one's thoughts so that one can begin to think about the problem one faces, but a crucially important stage in the legal analysis, odd things begin to happen. We are all familiar with the difficulties caused by the need to project distinctions on to facts that do not support them. Is this an offer or something else? Is this a condition precedent or something else? Is this person an invitee or licensee? Is this a sale of goods or something else? Is this thing a fixture or something else? There are, of course, paradigm cases, but the hard cases do not submit easily to analysis. We would be horrified if decisions on these questions were made by flipping a coin, and in hard cases, we try to find a satisfactory answer by asking what it is that we are trying to do.

V. The process of characterization is central to the inquiry into choice of law questions. Its importance is increased because, in general, the choice of the governing law results in its application to *every* issue that can arise. Such an approach is called a "jurisdiction-selecting" approach. We choose between the whole of Swiss or Austrian law, *not* between *a single rule to deal with the particular dispute* derived from Swiss or Austrian law. If we adopted this latter approach in respect of the issues arising in *Etler v. Kertesz*, we would consider the particular provisions of those laws as they had an impact only on the question of the enforceability of a contract tainted with illegality arising from a breach of

exchange control regulations in one of the two countries involved.

VI. Once the question of characterization has been determined, the remaining questions in the traditional choice of law process are also answered in the abstract. That is, the choice between Swiss law or Austrian law is made before the court (formally) considers the application of the particular rule in the facts of the case. The court is aware, of course, that, as the pleadings set out above disclose, each party is arguing that the law of one jurisdiction applies rather than another, and that the parties expect, at least, that the choice will determine the case in favour of one side or the other. As Professor Castel writes: (*Canadian Conflict of Laws*, 2nd ed. p. 29)

> The relevant conflicts rule of the forum enables the court to select the law of a particular country or jurisdiction applicable to that legal category or issue without first having to ascertain how that law would decide the case. The jurisdiction-selecting choice of law rule makes a state or country the object of choice. It does not consider the contents of the applicable law. Such a method is simple and easy to apply. It achieves certainty although it does not always achieve justice.

VII. In *Etler v. Kertesz* there was no express choice of the governing law. When the notion that contracts, or speaking more precisely, the binding force of contracts, derived from an exercise of human will became fashionable in the middle of the nineteenth century, it was thought necessary to justify doing anything that the parties had not expressly agreed to by finding an "implied term". Such a term would be to the effect that the parties would have agreed to what the court wanted to do if they had thought about it. One of the best examples of such reasoning can be found in the judgments of the court in *Taylor v. Caldwell* (1863), 3 B.& S. 826, 122 E.R. 309, (the "Music Hall" case) where the court justified its decision to regard the contract as frustrated on the ground that it could find an implied term in the contract. It was held that such a term provided for the mutual discharge of the parties in the events that had happened. This method of reasoning was consistent with the underlying theory of contracts at that time. No account was taken of the logical and economic (or simple fairness) problems of imposing on the parties a decision, ostensibly based on the terms of their agreement, that *ex hypothesi*, they had not thought about. No account was taken, or could be taken of the kind of bargain that might have resulted had the parties, or their legal advisers had the forethought to consider how the loss arising from the destruction of the music hall would be allocated.

VIII. As the will theory declined in popularity and was replaced (at least as regards the law of frustration) by a more forthright allocation of the risk of loss as the court thought fair in the circumstances, so too in conflicts it was seen as less necessary to justify the decision to "find" a choice of law term in the contract. The Court of Appeal in *Etler v. Kertesz* had accepted the more objective

theory of contracts and, while referring to the implicit choice cases, preferred a more objective formulation of the proper law. It is, of course, as unclear in conflicts cases as in contracts cases generally, whether it makes any difference to the actual result what theory the court adopts. The advantage of a more objective theory may lie in its more open acceptance of the court's role in the allocation of the risk of loss. Such openness is likely to lead to a greater degree of predictability.

IX. The following case is, perhaps, best understood as being a caricature of the traditional approach.

The Assunzione
[1954] P. 150, [1954] 1 All E.R. 278
(C.A., Singleton, Birkett & Hodson, L.JJ.)

SINGLETON L.J. This appeal from a judgment of Willmer J. arises out of a claim made by the plaintiffs, the owners of cargo lately laden on board the vessel *Assunzione,* against the defendants, who are the owners of the ship. The plaintiffs were charterers of the *Assunzione*, and they claimed against the shipowners damages in respect of damage to, and short delivery of, a cargo of wheat which was being carried by the *Assunzione* from Dunkirk to Venice. There is also a claim to recover the proportion of a salvage award which had to be paid on behalf of the cargo. We are concerned only with a preliminary point, and that is, what is the law to be applied to the contract of affreightment which was made between the parties?

It appears from the pleadings that both parties were at one time prepared to put the case in the alternative, that either the law of France or the law of Italy should govern the contract, but it was ascertained that the law of Italy contains certain provisions which would react unfavourably upon the plaintiffs' claim, and they now contend that the law of France should be applied, while the shipowners say that the law of Italy should be applied.

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Willmer J. came to the conclusion that the law of Italy should be applied to this contract. We have had a considerable number of authorities cited to us upon the question of what law should be applied. The parties did not state their desire, or their intention, upon the subject. It has been said that when that happens one must endeavour to find what the intention of the parties was on the matter. That does not appear to me to be very helpful, for in most cases neither party has given it a thought, and neither has formed any intention upon it; still less can it be said that they have any common intention. I am not sure how far it is necessary to consider all the authorities which have been cited to us, and which go back to the year 1865, but I must refer to some of them. Sir Robert Aske, on behalf of the plaintiffs, relies on what he described as the general rule; that is, that the law to be applied should be the law of the country in which the contract was made.

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a flag of another country, different considerations arise at once; there is the place where the contract was made; and a different flag, a flag of a country other than that in which the contract was made. Those are matters for consideration, and so are the terms of the contract. Although I believe it to be impossible to state any rule of general application, I feel that matters of very considerable importance are the form of, and place of, payment. In this case payment had to be made in Italian lire, and in Italy. In the circumstances of this case I regard it as a very important feature, coupled as it is with the facts that the ship was an Italian ship and that the destination was an Italian port.

There are two other authorities of recent date to which we were referred, one a decision of Langton J. in which he put forward convenience as a test, and the other a decision of the President in the year 1936 in which he placed emphasis upon a decision according to business efficacy. It seems to me that both those decisions are completely in line with the general proposition which I have sought to state, and which is taken from the words of Lord Atkin and of Lord Wright: one must look at all the circumstances and seek to find what just and reasonable persons ought to have intended if they have thought about the matter at the time when they made the contract. If they had thought that they were likely to have a dispute, I hope it may be said that just and reasonable persons would like the dispute determined in the most convenient way and in accordance with business efficacy.

Applying the rule which I have stated, and weighing all the facts to which attention was directed, I am satisfied that the scale comes down in favour of the application of Italian law, and that the decision of Willmer J. was right. In my opinion, the appeal should be dismissed.

I would not like to leave this case without thanking counsel for the help they have given us. in particular I would like to say what a pleasure it has been to listen to the argument of Sir Robert Aske, which has been of great help to each of us, an argument in which he stated the facts with great clarity, and in which, from his unrivalled knowledge of this subject, he dealt with a large number of authorities in a way which commanded, if I may humbly say so, my admiration.

Birkett and Hodson, L.JJ., gave judgment to the same effect.

QUESTIONS AND NOTES

1. What are the facts of the case? What is the contract dispute about?

2. Note that the search for the proper law in *The Assunzione* was made in the abstract; that is, the contracts issue being contested was wholly left out of the reasoning process. The court counted the contacts mechanically, without elaborating any theory as to why such contacts should bear on the resolution of the case. The mention by Singleton, L.J., of the importance of "business efficacy" suggests that judicial decisions should be justifiable by reference to extra-legal criteria. However, such reference in this case is left markedly vague. We are told to "look at all the circumstances and seek to find

what just and reasonable persons ought to have intended if they had thought about the matter at the time when they made the contract." As the notes after *Etler v. Kertesz* indicated, this statement raises the thorny problem of the role of implied (or, more precisely, inferred or "constructive") intention in contracts law.

3. If the parties to a contract have actually *intended* something, the issue before the court will be (barring pre-emptive concerns such as illegality and unconscionability) one of the interpretation of the contract. The process of interpretation does not have to be narrow and mechanical. Properly done it should seek to forward the parties' expectations as those may be found in the actual words used in the contract and in generally accepted business practices or understandings on such issues as the allocation of the risk of loss in particular circumstances. The process may often be very difficult as the words may be unclear and the background expectations unhelpful. Serious problems may arise if the parties have different expectations. The issue that then has to be faced is whether one party's expectations should be preferred over, or protected against the expectations of the other. Such a process must still serve the overall purposes of the law of contracts, and must for example, encourage reliance on contracts and promote the role of contracts in an exchange economy: see, e.g., *Federal Commerce and Navigation Co. Ltd. v. Tradax Export S.A. (The "Maratha Envoy")*, [1978] A.C. 1, [1977] 2 All E.R. 849, (H.L.) where the role of the courts in interpreting commercial contracts was usefully stated.

4. If the parties can be said "not to have intended" something in the sense that they have made no provision for its occurrence, and there are no background facts to supplement the agreement, the court's role is now one of the need to allocate a loss that was not foreseen and the risk of which was not allocated by the terms of the agreement or by its context. It is at this point that the courts advanced (more so in the nineteenth century and in the first half of this one than now) the notion that the allocation can be achieved by "finding" an implied term. Is the reasoning process advanced by stating that "just and reasonable persons would like the dispute determined in the most convenient way and in accordance with business efficacy?" Or is such a statement a means of masking the problem, such that it is ultimately resolved without any reasoning at all?

5. The preceding point becomes clearer if you consider the following questions:

(a) If you were counsel to one or other of the parties in *The Assunzione* how, assuming that you had expected the issue to be raised, would you deal with the evidence necessary to support an argument based on the criterion of what would "accord with

business efficacy"?

(b) How would your answer to part (a) differ if you had to address the question *in the light of the facts that the Court of Appeal had before it as it made its decision.*

(c) Does the process of reasoning adopted by the Court respect the characteristics of the judicial process: the right of the parties to participate through the presentation of proofs and reasoned arguments?

6. Are we being unfair, and if so how, if we suggest that you note that in the search for the jurisdiction with the closest and most real connection with the contract there is no closed list of connecting factors. We saw Singleton, L.J. noting that the ship had an Italian flag, an Italian owner, an Italian master and so on. He could easily have gone on to note that it had an Italian cook and a galley full of spaghetti, and that these facts also pointed to the contract's being governed by Italian law. The French facts, "connecting" the contract to France could also be multiplied by an imaginative lawyer. Judges who wish to manipulate the proper law of the contract test by multiplying connecting factors on one side of the equation find it very easy to do so. This means that the choice of law process in contracts can turn into a contest to see which party's lawyer can think up the most connecting features. When we speak of the choice of law rule as being the identification of that jurisdiction with the "closest and most real connection", we are asking a question which invites the same factual inquiry as that resulting from the question asked by the Court of Appeal. In other words, the judgment in *The Assunzione* adopts a rule that has the same content as the rule applied in *Etler v. Kertesz*.

7. One of the major justifications for the approach to the choice of law process exemplified in both *Etler v. Kertesz* and *The Assunzione* is that the results reached should be independent of the place where the dispute is litigated. As we saw in the discussion of the use of the *l.l.c.* as the choice of law rule, it is one of the principal purposes of any conflicts analysis to provide rules that are independent of the forum, i.e., the place where the dispute is litigated. Thus it is said that the traditional choice of law rules in conflicts promote uniformity.

8. It will be an important part of our investigation of the choice of law process to examine closely both what value really lies behind the desire for uniform solutions to conflicts cases and how that value can best be achieved. Do you think that the reasoning in either *Etler v. Kertesz* or *The Assunzione* would be conducive to uniform results if either case had been litigated in France, Italy, Nova Scotia or Peru rather than in Ontario or England? Would you have much confidence in advising a client with a charterparty problem what the outcome of

a dispute might be, if you had to rely only on what was said in *The Assunzione*?

9. The phrase "closest and most real connection" is an open-ended phrase. It may be quite clear in a large number of cases what law would be chosen by this test. (It is one of the features of the conflict of laws, as it is of any area of the law, that cases that are paradigmatic do not get litigated. The low incidence of conflicts cases—a fact which is true, as we have already stated, in spite of the wealth of cases in the footnotes of all the major texts—is also explained by the instinctive horror most judges and practitioners have for the whole topic. We shall try to convince you that excitement and curiosity rather than horror are more appropriate responses to conflicts cases.) It is equally clear that there will be many cases where the choice can only be made with difficulty. No more precision than you have already seen can be expected with a test like that found in *Etler v. Kertesz*. You could read thousands of cases and be only a little more likely to be correct in forecasting what result would be reached on any set of facts near the middle of the imaginary spectrum of facts connecting a contract more or less "closely" with two (or more) jurisdictions.

10. You should therefore expect no more certainty and predictability in conflicts than in any other area of the law where the governing principle is expressed in such vague terms. The reasons that prevent any more precision are equally obvious: none of the other tests (summarized in the notes preceding *Etler v. Kertesz*) that have been suggested are as free from simple contradictory results as the proper law test in its modern formulation. Some of these contradictions were mentioned in the discussion of those tests. A test like the *l.l.c.* is suspect because the courts feel that it really is a coincidence whether a contract is made in one jurisdiction rather than another, and that such coincidences should not determine the result of litigation. You must take this last statement as no more than more probably true than not: we shall see very many cases (in part because we specialize in the bizarre and pathological ones) where the result appears to depend on some completely fortuitous event or fact. It is, however, true that the extent to which there appear to be unjustifiable decisions in conflicts is larger than in any other area of the law. The existence of a more significant element of randomness in the results of conflicts cases presents us with one of our most intractable and difficult problems of analysis. Why is this so, and what can we do about it?

11. These concerns may indicate very sketchily the problems that arise from the methods for choosing the law to deal with geographically complex contracts indicated in the cases. The rules found in the cases are generally accepted and can be relied on as the rules that a court will expect to hear when a conflicts argument is presented to it.

12. The next case is a modern example of the English choice of law rules for contracts in the hands of a court that is very competent in dealing with the traditional rules. The handling of the rules is as well done here as in any other case that you will find.

Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.
[1984] 1 A.C. 50, [1983] 2 All E.R. 884,
(H.L. Lords Diplock, Wilberforce, Roskill, Brandon and Brightman.)

[The plaintiff, Amin Rasheed Shipping Corp. had insured its ship with the defendant insurer. The plaintiff was a Liberian corporation and operated out of Dubai. The ship was seized by the Saudi Arabian authorities for alleged violations of oil export controls. Such an event would give rise to a claim under the insurance policy issued by the defendant. The policy on which the plaintiff sued was the standard Lloyd's marine policy. This policy is scheduled to the *Marine Insurance Act*, 1906 of England. (The same policy is scheduled to the *Marine Insurance Act*, R.S.O. 1990, c. M.2.)

[The plaintiff sought to sue the defendant in England. The defendant had no office in England. The plaintiff had, therefore, to obtain leave to serve the writ out of England under Order 11 of the Rules of the Supreme Court.[1] Leave could be given if it were held that the action was, under R.S.C., Ord. 11, r. 1(1)(f), "to enforce . . . a contract . . . which . . . (iii) is by its terms, or by implication, governed by English law . . .." The trial judge, on a summons brought by the defendant to set aside the permission to serve the writ *ex juris* that had been given on an *ex parte* application by the plaintiff, held that the contract was not governed by English law, but by Kuwait law. Alternatively he had held that, even if the claim came within Order 11, he would exercise his discretion not to allow service *ex juris*. The Court of Appeal[2] dismissed the appeal: 2:1 on whether the contract was "governed by English law", and 1:1 (one judge abstaining) on whether the court should exercise its discretion in favour of the defendant. The plaintiff appealed to the House of Lords.

[LORD DIPLOCK referred to the issue of the law to "govern" the contract as "the jurisdiction point" and the issue whether, assuming that the jurisdiction point had been decided in favour of the plaintiff, the court should exercise its discretion to permit service *ex juris* in the circumstances, as "the discretion point".

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[1]R.S.C., Order 11 was, and still is, the model for the equivalent provisions of the rules of court of most common law provinces of Canada. The former Ontario Rule 25, the current Rule 17.02 and, for example, Rule 13 of the British Columbia Rules of Court and Rule 31 of the Saskatchewan Rules of Court were, or are modelled on Order 11. The Rules of Nova Scotia and Prince Edward Island are very different. We shall look at the Rules in more detail later.

[2]As an aside, it might be noted that the judge, Robert Goff, J., who first allowed the plaintiff, on its *ex parte* application, to serve the defendant *ex juris*, had by now been promoted to the Court of Appeal (as Robert Goff, L.J.) and participated in the judgment of that Court. He there held that the action did not come within Ord., 11 as the contract was not governed by English law. He expressed no opinion on the question whether the court should, assuming that it had jurisdiction to give leave, exercise its discretion to do so.

> Royal Exchange or London clause is insignificant, but I regard the incorporation of the Institute clauses, with express reference to English law provisions, as important. Wit no great confidence, and reluctantly differing as to the ultimate conclusion from Bingham J. and Robert Goff L.J., whose reasoning in principle I approve and follow, I have reached the conclusion that English law is the proper law of this particular contract.
>
> The other judges agreed with Lord Diplock.

NOTES

1. The judgments in the *Amin Rasheed* case have been reproduced at length for two reasons: (a) the discussion of the traditional choice of law process in contracts is good, and provides an excellent illustration of how that process should be undertaken; and (b) the issue of whether an "international" or "unlocalized" law of contract can or should exist is an important issue to which we shall return. When we do, it will be important to assess carefully the validity of the arguments that Lord Diplock and Lord Wilberforce use to deal with the issue, and we shall have to examine their judgments again. Lords Wilberforce and Diplock are probably the best two judges in the English tradition of the common law of conflicts. As we shall see, it is necessary to separate the English from the American tradition, and this separation can be most fairly done by focusing on what is the best in each tradition.

2. You will have noticed in the cases that we have looked at that frequent references have been made to contracts where the parties have made an express choice of the law to govern their contract. We shall deal with the cases where there is such a clause in the next section.

3. The following statement of the rules offers a convenient summary of the traditional method for dealing with the choice of law problem in contracts set out in the preceding cases, and including those rules where there is an express choice of law clause in the contract.

Dicey & Morris

Rule 180:

> The term "proper law of a contract" means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.

Rule 181:

> The formation of a contract is governed by that law which would be the proper

QUESTIONS AND NOTES

1. Notice that it was not necessary for any court in *Vita Foods* to choose any law to "govern" the contract? The Privy Council's interpretation of the effect of the Newfoundland statute meant that it did not matter to the result of the case whatever law was applied, Newfoundland, Nova Scotia, English or New York.

2. Because the court is dealing with the (perceived) problem of setting limits on the scope of the parties to choose a law to "govern" the contract, it believes that it must set limits on that power of choice. The restrictions on the parties' freedom to choose the law to govern the contract are not very well thought out. Lord Wright says, (*supra*, p. 65) "Connection with English law is not as a matter of principle essential". This statement has led to a lot of debate. It is said that an unrestricted right to choose a law that has no connection with the contract is undesirable. Why should this assumption be made? What factors, as a practical matter, are likely to motivate parties to choose a law to govern their contract? Is it likely that two Canadian parties would choose to have their contract governed by the law of Afghanistan? But if they do so, what does that fact say about the parties themselves? Might it not be that they were both from Afghanistan? If so, why should anyone care if they chose that law? Some of these issues are discussed by Falconbridge in a case comment on *Vita Foods* in (1940), 18 *Can. Bar Rev.* 77.

3. The short answer to the problem is that all that a choice of law clause can do is to indicate the background legal system against which the contract was drafted or made. What else could such a clause do? If a provision on Ontario law is held by an Ontario court to be applicable to a particular contract, the *Securities Act* or the *Real Estate and Business Brokers Act*, for example, nothing that the parties may intend, hope or fear has any bearing on the applicability of the statute. Conversely, if the act does not apply (because the court holds for any reason that it should not) it would be bizarre to conclude that the act *should* apply because the parties chose Ontario as the "governing law." By itself, a choice of law clause neither expands nor limits the scope of the parties' freedom to make such deals on such terms as seem good to them.

4. It is sometimes said, for example, that the parties may not, by an appropriate choice of law clause, avoid the common law doctrine of consideration. Apart from the fact that that doctrine of consideration only operates to make unenforceable contracts that should (on other grounds) be enforceable, it is hard to see that a choice of the law of a jurisdiction with a wider basis for enforcement than the common law doctrine of consideration should be ignored. After all, we are only concerned that the promisor not be caught by unfair surprise by being held liable to an obligation that he or she had

not (because the deal was not a standard commercial deal) expected. If the careful selection of, for example, the law of Québec suggests that the parties showed sufficient deliberateness to justify enforcement of the contract, why should anyone care? It is easy to over-simplify the doctrine of consideration in the common law. If a seal renders that doctrine inoperative, why should an express choice of law clause not have similar effect?

5. Nonetheless, *Cheshire and North's Private International Law*, 11th ed. (London: Butterworths, 1987) at p. 478 states:

> In England and other common-law countries a contract not under seal is void unless supported by consideration. Since requirements of this nature are essential to the creation of a valid contract, the question whether they are binding in a particular instance must be determined by some law independent of the volition of the parties. *In the nature of things* this can only be the putative proper law, i.e. the law of the country with which the contract, presuming it to be valid, will have the most substantial connexion.

(Emphasis added.)

6. This language is typical of reasoning in conflicts. What, for example, does the phrase, "in the nature of things" mean? Does it mean that the problems of the conflict of laws, or of contracts, are natural phenomena which have their own imperatives like the law of gravity? Does the phrase mean that these problems exist independently of any human mind, and that what we should or should not do is as fixed by natural factors as the rules of hygiene? What scope is left for human choice in what we want to do, or what we think that we should do?

7. In addition, *as a matter of the law of contract* has the author of *Cheshire & North* got the common law of contract correct? Is it true to say that the requirement of consideration is "essential to the creation of a valid contract"? How often, as a matter of fact, do the courts enforce contracts (or did something functionally indistinguishable from enforcement) where there was no consideration? Doctrines like promissory estoppel have torn a large hole in the traditional doctrine of consideration.

8. It is unlikely that an appropriately drafted choice of law clause would avoid any or all of the following problems:

(i) the doctrine of fundamental breach;

(ii) the rule regarding the enforcement of penalties;

(iii) the fiduciary obligation of an agent to her principal;

(iv) the meaning to be given to a word like "condition";

(v) the availability of relief for mistake or on the grounds of frustration; and

(vi) the assignability of a contractual claim.

9. These questions can in one sense be seen as requiring a process of exegesis of the passage from Lord Wright's judgment in *Vita Foods* where he says that the choice of law made by the parties will be effective if "bona fide and legal and not contrary to public policy". The suggested answer to question of the limits of a choice of a law clause is that a choice of law clause has as much, *but no more* effect than any other clause in a contract.

10. McLeod, *The Conflict of Laws*, (Calgary: Carswell Legal Publications, 1983) ("*McLeod*") p. 488 states the following rule:

> **Formation.**
>
> *Rule 152*: The formation of a contract, and the prerequisites necessary thereto, are governed by the putative proper law of the contract.

The rules of formation are said to be the rules governing offer and acceptance and consideration. McLeod states, "in Anglo-Canadian law, consideration is a necessary prerequisite to the validity of all contracts not under seal". The "putative proper law" is the proper law that would apply if the contract were validly made. McLeod's view of the putative proper law is based on that of *Dicey & Morris* (*supra*, Rule 180) as opposed to that of *Cheshire & North*, and he appears to accept the view that would permit the parties by a suitably drafted choice of law clause to avoid the doctrine of consideration, though his view on this issue is not completely clear.

11. It is also unclear how far the parties' freedom to select the proper law extends to the other issues mentioned in Q. 8. McLeod refers to the case, *Albeko Schuhmaschinen v. Kamborian Shoe Machine Co. Ltd.* (1961), 111 L.J. 519 (Q.B.D.) where the issue was whether the English or Swiss postal acceptance rule applied to determine if there had been a valid acceptance of an offer. (Swiss law puts the risk of loss in the mail on the offeree, and requires that the acceptance reach the offeror for there to be a contract.) The judge held that the Swiss rule applied as the putative proper law, so that there was no valid contract. Does it, or should it matter what the function of the postal acceptance rule is?

12. Choice of Law clauses are, as we have mentioned, often standard

"boiler-plate" in contracts drafted by Canadian lawyers. There has been very little litigation over such clauses. An express choice of New York law in a student loan agreement was enforced in *Long Island University v. Morton* (1978), 81 D.L.R. (3d) 392 (N.S. Co. Ct.). The clause in this case read:

> The maker hereby expressly waives the defence of the *Statute of Limitations*, and all other defences arising out of any lack of diligence in enforcing the payment thereof . . . and the laws of the State of New York shall govern this note.

The clause in *Nike Infomatic Systems Ltd. v. Avac Systems Ltd.* (1980), 105 D.L.R. (3d) 455 (B.C.S.C.), read:

> This agreement is to be governed by and construed according to the laws of the Province of British Columbia. If, however, any provision in anywise contravenes the laws of any state or jurisdiction where the agreement is to be performed, such provision shall be deemed not to be a part of this agreement therein.

13. It was dimly seen by Lord Wright in *Vita Foods* that some restrictions must be placed on the parties' power to choose the "governing law" if that choice is to determine every aspect of the contract's validity and enforcement. In other words, if you consider the range of matters over which the proper law has "control" in the formulation of *Dicey & Morris*, does it follow that the parties cannot, for example, choose a law to avoid a provision of some other law designed to protect minors? As you will remember, the proviso stated in *Vita Foods* was that the choice must be "bona fide and legal", and not contrary to "public policy". We could translate the phrase "bona fide" as incorporating an idea like unconscionability: the choice must not be slipped into a contract to catch one party by unfair surprise. It is unclear what the word "legal" denotes. It would seem to have either a reflexive function—what's legal is legal is legal . . . —or none that provides any help in knowing how far the parties are free to choose the law to govern their relation. The phrase "public policy" has more content, but is a phrase that has to be treated very carefully. As used by Lord Wright in *Vita Foods*, the phrase probably means that the choice must not be an attempt to avoid an argument that the whole deal stinks and is one that no English court would ever consider. Just as no court will enforce a contract in which the defendant promised to pay the plaintiff $10,000 to murder someone (and even if the plaintiff has fully performed his or her "obligations" under the contract), so too it will not enforce a contract that is offensive to the court even though the parties may have chosen a law by which the contract would be valid and enforceable.

14. It is not easy to find or even to think of examples of such contracts now, but one area that might raise the problem would be contracts where a woman agrees for a fee to have a child by the male partner of a couple who would otherwise be childless. One jurisdiction might regard the enforcement of such contracts as being contrary to public policy, on the grounds either that they might involve adultery or fornication, or because they might contribute to the exploitation of poor women. The result of such a conclusion would be the dismissal of a claim either for the promised payment or for the child. (How far a claim based on unjust enrichment would succeed may be another matter.) Some other jurisdiction may regard such contracts as unobjectionable in general, though possibly subject to some controls, and in such a jurisdiction a claim for the promised payment (if not for the child) may well be enforceable. A narrower problem might arise in the context of the "criminal rate of interest" under Section 347 of the *Criminal Code*.

15. Some significant changes may be made in the commercial law of Canada through Canada's accession to the United Nations Convention on the International Sale of Goods (the Vienna Convention) and the enactment by the provinces of legislation to implement the Convention.

International Sales of Goods Act, 1988

The Convention is set out as a Schedule to the *International Sales of Goods Act, 1988*. R.S.O. 1990, c. I.10, (the "Act") and is a comprehensive code governing international sales of goods. The following points should be noted:

(a) The Act prevails over any other act;

(b) The Convention (Art 1) applies to "contracts of sale of goods between parties whose places of business are in different states:

  (a) when the States are Contracting States; or

  (b) when the rules of private international law lead to the application of the law of a Contracting State";

(c) The Convention (Part II, Art 14) may change the rules governing the formation of contracts of sale, the common law rules of "Offer and Acceptance". In particular, the Convention may change the enforceability of letters of intent;

(d) The Convention incorporates provisions substantially similar to several in the Uniform Commercial Code, e.g., § 2-207 (Art. 19);

(e) The obligations of the seller are spelled out in considerable detail and may well change the allocation of risk that the *Sale of Goods Act* established;

(f) Significant changes are made in the common law dealing with conditions, anticipatory breach, excuses and in such things as the right of the buyer to interest on the price paid for goods when the seller has to repay it.

(g) The Convention applies unless the parties contract out of it. (Act, s. 6, Art. 6)

Some of the provisions of the Convention would have become law in Canada if the Draft *Uniform Sales of Goods Act* of the Uniform Law Conference of Canada had been adopted by the province. To some extent the Draft Act has been superseded by the Convention as it more closely resembles the Draft Act and Article 2 of the Uniform Commercial Code than the *Sale of Goods Act*.

It is interesting that most Ontario lawyers who face the need to advise their clients on what to do about the Vienna Convention routinely recommend that it be excluded. Their argument is, briefly, that for all the deficiencies of the common law and *Sale of Goods Act* in dealing with international sales of goods, a change to a new regime creates so much uncertainty that it is not worth whatever advantages may accrue. There is another problem. The Convention is drafted in a style that is not usual for statutes in the common law world. Until there is a body of law deduced from the cases available from the courts, no one can have any certainty what many provisions might do to the parties' expectations if litigation were to occur.

SOME FURTHER PROBLEMS OF CHOICE OF LAW IN CONTRACTS

The following cases deal with the problem of explicating the limits on the parties' implied or express choice of law. The cases are not good examples of an attempt to deal with the problems that they raise, but they are fairly typical examples both of the traditional approach to the problems of the conflict of laws, and of the problems raised in deciding how far the parties (or, more usually one of them) can avoid the application of laws that they do not like. Good cases on these issues are not easy to find. The explanation of this fact is probably the same in conflicts cases as in other areas of the law: parties seldom are anxious to have a judge look at what they are not very proud of.

The principal problem raised by all the cases in this section is their value as indicating what the courts might do in a similar case in the future. You should consider carefully the extent to which you could safely rely on the "rules" (though it is stretching things a bit to refer to what the courts say in these cases as generating any rules of any kind) that seem to be established by

the courts.

A more important and more difficult inquiry is to consider the impact of the courts' decisions, not on the development of *conflicts* rules, but on the *domestic* rules of the courts' own jurisdictions. One fact of prime importance in most of the cases we shall examine is that the court that is asked to determine the applicability of the statute in each case is the court of the jurisdiction that passed the statute. Neither case is like *Etler v. Kertesz* and *The Assunzione* where the court had, or might have had to apply the law of another jurisdiction. In terms of the proof of foreign law, in neither of the two cases that follow does the law decided to be applicable have to be proved by expert evidence.

The importance of the point made in the previous paragraph derives from the following argument:

(a) The process of interpretation of any rule of law, whether its origin is statutory or found in the common law, will indicate that there are cases clearly within (or equally clearly outside) the rule—what we can call paradigm cases—and cases that must be much more carefully considered: the marginal cases. A case will usually be a marginal case because it is unclear whether the statute was meant to apply to it or not.

(b) An excellent example of such marginal cases, and of the courts' approach to the problems that they create is provided by the judgment of the Ontario Court of Appeal in *Reference Re Certain Titles to Land in Ontario*, [1973] 2 O.R. 613, 35 D.L.R. (3d) 10. The court held, more or less in the teeth of the statute, that the provisions making the purchase of land void where compliance with the *Planning Act*, R.S.O. 1960, c. 296 (as amended) could not be shown, did not apply to "bona fide" purchasers. The decision of the court has the effect of drawing a line so far as the application of the statute is concerned between those who are "bona fide" purchasers of land and those who are not. In other words, the degree of "bona fide-ness" of the purchaser will determine whether the statute applies or not. The question cannot be one that resembles an on/off switch, but one that is more like a graduated scale: at either end there are the paradigm cases, either clearly within the statute, or clearly outside it, and in the middle are the problem ones.

(c) The Ontario Court justified its conclusion that the *Planning Act* did not apply to "bona fide" purchasers on the ground that the purpose of the act would not be forwarded by its application to such cases: what purpose is served by denying title to those who had no idea that compliance with the *Planning Act* was required? When the application of a statutory rule is determined by the degree of foreign-ness of the facts of the case, we must assume (unless the statute has no purpose, and we cannot accept this fact since it borders on being a contradiction in terms) that the decision not to apply the act to a case with a certain amount of foreign-ness forwards the purpose of the statute. The decision of the House of Lords in *Amin Rasheed* on the "discretion point" is an example of such a case. The House held that the foreign facts were so extensive that it would be

appropriate not to allow the case to be brought in England. The degree of "foreign-ness" of a case may have a similar effect on the problem of applying other statutes. Certain provisions of the *Income Tax Act* apply to those "resident" in Canada. There are very many cases determining who is or is not resident in Canada for the purpose of that act. The decision whether to hold a taxpayer liable under these provisions will depend on the degree of foreign-ness of the taxpayer, determined with reference to the concept of residence.

(d) Just as there is a limitation on the scope of a statute when, for example, it is held not to apply to bona fide purchasers of land, so too there is a limitation imposed when it is held not to apply by reason of the foreign facts in a case. If we justify the limitation in each case on the ground that its imposition forwards the purpose of the statute, we can infer from the mere creation of the limitation some facts about the court's view of the statute's purpose. This inference cannot be anything other than a general statement made by the court of how the statute will be applied in the future. This process of reasoning about the purpose of statutes applies, of course, to any rule of law, statutory or common law, and is one of the most familiar features of the common law system.

The consequences of the argument that has just been made are more frequently ignored than not in the consideration of conflicts cases. (Why this fact should exist here and nowhere else is one of the consequences of the view of conflicts that it is a special area of the law with its own arcane rules and its general aura of mysticism and baffling complexity.) The two cases that follow raise this problem. They force us to decide what purpose the court saw for the domestic statutory rule as it dealt with the decision whether to apply the rule to a case of geographical complexity. That purpose *must*, if the law is to have any element of rationality about it, be relevant in a wholly domestic case involving the same statute.

Our task is to consider how the court in each case can avoid the consequences arising from the fact that its decision in the case of geographically complex facts indicates a view of the purpose of the statute that will make its application in any subsequent case, including any wholly domestic case, very hard to justify. In other words, in each case the court seems to have adopted a purpose for the statute that makes it largely inapplicable to *any* case, with or without geographically complex facts, arising in the future. If the court is unlikely to accept this consequence, as is probable, then we have to re-consider whether the failure of the court to apply the statute in the case with geographically complex facts can be justified. In essence this argument is that cases of geographically complex facts can be no different from any other case, both in the guidance they provide on what factors the court will consider as relevant to the decision to apply a statute or not, and on the purposes that the court sees for the statute.

This argument applies *only* in those cases where the court that is asked to resolve a dispute by reference to a particular statute is also the court of the jurisdiction whose legislative body passed the statute. In these cases the court can take judicial notice of the statute, and has no need to use either expert evidence of a foreign law or the extended powers given by some of the provincial *Evidence Acts* that were set out earlier.

Section 28:

> 28. No licensed agent or salesman shall pay a commission or other fee to an unlicensed person in consideration for furthering a trade in real estate.

I find that s. 21(1) applies to the plaintiff and that s. 18 applies to the defendant. The contract is therefore unenforceable in Alberta as being illegal under the *lex fori*.

The action of the plaintiff is dismissed.

It is unnecessary to decide the exact nature and terms of the agreement that existed between the parties, but it is admitted that there was an agreement in existence between them which I have found contrary to the law in Alberta. Under the circumstances I allow no costs.

QUESTIONS AND NOTES

1. Suppose that the judgment of MacDonald J. were accepted on the conflicts issue, *viz*, that the applicability of the Alberta legislation could be determined by the normal choice of law rules. Does it follow that the parties could have provided that the law of Ontario should govern their contract, and that the court would then have enforced the agreement?

2. If that had happened, what would that conclusion say about the scope and purpose of the Alberta act?

3. In view of the court's decision on the applicability of the act, was there any choice of law issue raised by the case? In other words, and now ignoring the premise of Q. 1, did it matter, or could it have matter what law the parties chose?

4. The facts of *Gillespie Management Corp. v. Terrace Properties* (1989), 39 B.C.L.R. (2d) 337, 62 D.L.R. (4th) 221, (B.C.C.A., Southin, Cumming & Legg, JJ.A.), illustrate the problem of illegality by a foreign law and the judgments suggest a useful solution. The parties had entered into a management agreement on October 15, 1985, under which the respondent was to assume the management of the appellant's apartment building in the State of Washington, U.S.A. The agreement was made in British Columbia between the plaintiff, a British Columbia company, and the defendants, Terrace Properties, a Washington limited partnership, and Dr. C.M. Papadopoulos, a British Columbia resident and the general partner of Terrace. The agreement contained a three month notice provision for its termination. The appellants terminated the agreement on July 28, 1986. No notice pursuant to the terms of the agreement was given to the respondent, nor was any payment in lieu of notice made. The

respondent then brought an action in British Columbia for damages for alleged breach of contract.

The trial judge held that he was unable to conclude, on the balance of probabilities, either that the respondent had broken its contract in general terms or that it should be found guilty of misconduct or gross negligence or gross inefficiency, the grounds for termination without notice set out in the agreement.

In the Court of Appeal the only issue raised was the effect of the fact that the respondent was not licensed as a real estate broker in the State of Washington. The Washington State Code provided:

> **18.85.100 License required - Prerequisite to suit for commission.** It shall be unlawful for any person to act as a real estate broker, associate real estate broker, or real estate salesman without first obtaining a license therefor, and otherwise complying with the provisions of this chapter.
>
> No suit or action shall be brought for the collection of compensation as a real estate broker, associate real estate broker, or real estate salesman, without alleging and proving that the plaintiff was a duly licensed real estate broker, associate real estate broker, or real estate salesman prior to the time of offering to perform any such act or service or procuring any promise or contract for the payment of compensation for any such contemplated act or service.

Cumming J.A., with whom Legg J.A., agreed, first investigated the general conflicts approach to illegality. He referred to Dicey & Morris (*Dicey and Morris on the Conflict of Laws*, 10th ed. (1980), p. 812) and to Castel (*Canadian Conflict of Laws*, 2d. ed. ¶ 427) and to the leading cases from which he deduced the statement that a contract must not be illegal by the law of the place of performance. He concluded that the plaintiff could not recover since: (at p. 344 B.C.L.R., p. 228 D.L.R.)

> . . . in order to support its claim . . . [the plaintiff] would have to rely upon what it would have done during the three month period following receipt of the notice of termination had its services not been terminated. In both instances, however, what the respondent would be relying upon were or would be acts which it was illegal for it to perform in the State of Washington. Such claims as these cannot be sustained in the courts of this Province.

Southin J.A., agreeing with Cumming J.A., in the result, said: (p. 338, B.C.L.R., p. 222 D.L.R.)

> The issue which arises whether a party to a contract can recover here consideration due him for performance of his obligations or damages when he has been prevented from performing when the contemplated performance was, in part, in a foreign jurisdiction.

> So far as counsel enlightened us, none of the previous authorities on illegal performance was precisely of this nature and I am not prepared to say that the answer to that question is invariably "No, he cannot recover".
>
> The doctrine of illegality is founded on considerations of public policy—not foreign public policy but the domestic public policy of not enforcing unlawful bargains or requiring unlawful conduct. I leave open the question whether this Court must always defer to the law of the foreign state and hold that that which is unlawful there is unenforceable here as contrary to our public policy. But, as a matter of our own public policy, I think we should give effect, in these circumstances, to foreign legislation which is of the same order as domestic legislation.
>
> In British Columbia, it is unlawful to act, as it is in the State of Washington, as an agent for the collection of rents unless the agent has a licence. Without a licence, a person who does such an act here cannot recover his fees.
>
> I consider that this Court should give effect, as a matter of domestic public policy, to a foreign public policy analogous to our own.

The relevance of any conflicts analysis to either judgment is slight. Cumming J.A. could have said what he did without any reference to any rule stating that performance of a contract must not be illegal under the law of the place of performance, though he gets comfort in his decision to apply Washington law from the cases and texts. Southin J.A. notes that both British Columbia and Washington have the same legislation and that *as a matter of B.C. law*, she will not enforce an agreement that would violate that legislation. This approach avoids all choice of law issues. It clearly would not matter to Southin J.A. that the parties had chosen a proper law that would have made the contract legal. (This statement means that, under the terms of the legislation of the chosen jurisdiction, either expressly or by judicial interpretation, performance of the agreement by an unlicensed agent would not be illegal.)

Southin J.A., looks at the problem as a *British Columbia problem*: "Should this contract be enforced in B.C.?" Her answer is no, for enforcement would ignore the provisions of a Washington statute that has the same effect as the B.C. legislation dealing with the same matters. Subject to the general concerns that always accompany any allegation by a defendant that a plaintiff may not recover for work done on the ground that recovery is illegal, Southin J.A. has simply treated the case as an ordinary contracts case, albeit one with geographically complex facts. Those facts make it impossible to apply the B.C. legislation directly (it would be beyond the constitutional capacity of B.C. to do so), but the similar legislation in both jurisdictions strongly supports the conclusion that the contract should not be enforced. Illegality under the foreign law, when the contract is not illegal under the law of the court hearing the case, need not, as Southin J.A., points out, necessarily result in a refusal to enforce the contract, though clearly, it may justify such a refusal.

5. As a matter of the law of contract it is odd, is it not, that the parties in *Ross v. McMullen* would choose to have their contract governed by a law that would make it *invalid*? Can you imagine any plausible reason (aside from simple ignorance of the law) why two people would make any kind of deal in these circumstances?

6. Do you think that the court gave enough consideration to the problem of the interpretation of the legislation? Is it absolutely inevitable that the agreement has to be considered as being within the statute?

7. In *R. v. Sutcliffe Agencies Ltd.* (1980), 17 R.P.R. 245 (Man. C.A.), a real estate agent, who was licensed in Ontario, and who had a listing of land in Ontario, was approached by a Manitoba resident who wanted to purchase the land. The agent took the agreement of purchase and sale to Winnipeg where the purchaser signed the agreement. The agent was prosecuted in Manitoba for acting as a real estate agent without a Manitoba licence. What the agent did was held to be a violation of the *Real Estate Brokers Act*, R.S.M. 1970, c. R. 20, and a conviction of the agent for "negotiating" a sale in Manitoba without being licensed to do so was upheld.

8. The *Guarantees Acknowledgement Act*, R.S.A. 1970, c. 163 requires that a person attend before a notary public to acknowledge his guarantee before it is enforceable against him. Should this requirement be displaced by a provision in the contract of guarantee that it "shall be construed in accordance with the laws of the province of Ontario", where no such requirement exists?

9. This issue was raised in *Greenshields Inc. v. Johnston* (1981), 119 D.L.R. (3d) 714 (Alta. S.C.); aff'd (1981), 131 D.L.R. (3d) 234 (Alta. C.A.). The court assumed that "construed in accordance with" was the same as "governed by". The guarantee was signed by an Alberta defendant in order to guarantee a debt which arose in Alberta. The choice of Ontario law was held to be *bona fide* and legal, and the defendant admitted that he understood the nature of the document. The facts that the head office of the plaintiff company was in Ontario and that orders and confirmation vouchers were processed through the Toronto office of the plaintiff provided a sufficient connection with Ontario to indicate that the clause was not inserted in order to evade the Alberta statute. The law of Ontario was found to be the proper law of the contract and the guarantee was, then, upheld.

12. The following additional facts in *Etler v. Kertesz* might be relevant:

Article VIII(2)(b) of the *Bretton Woods Agreement*, the Constitution of the International Monetary Fund, states:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of any member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member.

The Bretton Woods Agreement Act, R.S.C. 1985, c. B-7, s.3 states:

> On and after the 27th day of December 1945, the first sentence of paragraph 2(b) of Article VIII of the Agreement set out in the First Schedule has the force of law in Canada.

If Austria were a member of the International Monetary Fund at either the date of the loan or the date of the trial, should this fact influence the court? Would it matter if Austria were not?

REVIEW AND FURTHER EXAMINATION OF TYPICAL CASES

If we now review the cases that we have considered and summarize the rules and principles that we can derive from them, we could produce an outline of the choice of law process (keeping in mind that it is only one of three issues that might arise in a case with geographically complex facts, the other two being Jurisdiction and the Recognition and Enforcement of Foreign Judgments) something like this:

(a) The applicability of the contracts choice of law rule (in any formulation) depends on the characterization of the question before the court as one involving the law of contracts

(b) The choice of law rule to govern cases that are characterized as contracts cases is that the contract is to be governed by its proper law. The phrase "proper law" has been variously defined as being the law of the place where the contract was made; the law intended by the parties to govern their contract, such intention being either inferred from the agreement or expressed in it; or the system of law with which the contract has its "closest and most real connection".

(c) Where the court finds that the parties have made an express choice of the law to govern their contracts, that choice will normally be given effect to provided that it is "bona fide and legal and not contrary to public policy".

(d) Where there has been no law expressly chosen by the parties, the contract will be governed by that system of law with which the contract has its closest and most real connection. The application

of this test involves the consideration of all of the aspects of the contract: its making, the place of its making, the nature of the parties, the subject-matter of the contract, the place of performance, its terms and the origin of those terms.

(e) (i) The use of the word "governed" may be taken to mean that all aspects of the contract—its validity, enforceability, its legality (possibly), its interpretation—are to be decided with reference to the proper law.

(ii) The choice of law process or method does not focus on the content of the possibly competing systems but solely on whether one system of law or the other governs the contract.

(f) All contracts must be "localized" with one system of law in the world; there cannot be an "unlocalized" contract, finding its force in some modern equivalent of the law merchant of the Middle Ages.

The next four cases are further examples of the choice of law process in Contracts. As you read them, consider how far they provide evidence that the use of the choice of law rules we have been considering would,

(i) be applied uniformly by each of the concerned jurisdictions (or any other jurisdiction),

(ii) give useful guidance to subsequent courts, and

(iii) be generally accepted because any court anywhere would see these issues as contracts issues, i.e., the characterization process would lead to the same result in any court.

The first case deals with unenforceability under a foreign law and, again, the relation between that fact and the choice of law issues.

Bondholders v. Manville
[1933] 4 D.L.R. 699, [1933] 3 W.W.R. 1
(Sask. C. A., Haultain C.J.S., Turgeon,
Martin & Mackenzie JJ.A.)

[The facts were stated by Turgeon J.A.: The defendant signed a promissory note in connection with the purchase of land in Florida (during the Florida land boom of that period). She is now being sued on the note by a holder in due course. The defences raised include, *inter alia*, an argument that the defendant is not bound "because by the laws of Florida a married woman cannot make a promissory note." "(The) note was made in Florida, (is) payable there, and

> On the whole I am of the opinion that, at least in the case of mercantile contracts not prohibited by the *lex fori*, the weight of authority is to the effect that the capacity or incapacity of a person to contract must be determined by the law of the country where the contract arises. Therefore Mrs. Manville is not bound by her signature to the note sued upon in the second action.

NOTES

1. The choice of law process in *Bondholders v. Manville* is exactly the same as that which we have been examining. The only difference is in the formulation of the rule. *Bondholders* is the case that applied the old rule that the choice of law rule to govern contracts is the law of the place of making. It differs from *Etler v. Kertesz* in the formulation of the choice of law rule, but the process of reasoning to the result fits exactly within the outline in Table 1.

2. The cases referred to by Turgeon J.A., *Sottomayor v. De Barros*, *Simonin v. Mallac* and *Male v. Roberts*, were cases in which the validity of a marriage was in issue. Note that it is almost always inappropriate to use marriage cases as authorities in commercial cases. We shall explore this issue later in the course.

3. The kinds of questions with which we have been concerned so far have taken the validity of the choice of law process illustrated in the cases very much for granted. We have not considered whether it might be seriously or fundamentally flawed. Nothing as important as the process outlined in the preceding cases can be taken for granted. To begin a more radical assessment of the process we can usefully ask two questions that arise out of *Bondholders v. Manville*.

> (a) Was any purpose served by applying the foreign law? That is, were any policies, conceived by Florida law or by Saskatchewan law as relevant to an action on a contract, advanced by the decision?
>
> (b) Was there a good reason to depart from domestic legal policy regarding contracts, *viz*, that bargains are enforced in the absence of strong reasons to the contrary.

4. The problems of married women's contracts as a separate problem of the law, one now no longer with us: everyone being equally free to put herself or himself into the lion's jaws and to hope, sometimes against all the evidence to the contrary ,that the lion will be a merciful lion. (See. Llewellyn, *The Common Law Tradition*. (New York: Little, Brown and Company, 1960) pp. 362, 363.) For a discussion of married women's contracts in conflicts cases, see B. Currie, *Selected Essays on the Conflicts of Laws* (Durham, N.C.: Duke U.P., 1963) pp. 77-127.

NOTES

1. *Charron v. Montreal Trust* is regarded as very good authority for the common law choice of law rule that we have seen being developed by the courts. It is consistent with the underlying theory of conflicts that the same rule should be applied to test the validity of a separation agreement, an international contract of marine insurance, a loan, an agreement to split real estate commissions and an ocean bill of lading. It is important that you accept that the traditional approach to choice of law does not concern itself with the nature of the contract in issue and, indeed, that such an inquiry has no place in the analysis: a contract is a contract is a contract . . . .

2. The case of *Charron v. Montreal Trust* raises a fundamental problem of the conflict of laws, one that we shall examine in more detail later in the course, particularly in the context of matrimonial property and succession.

3. Consider what the result in *Charron* would have been in the issue in the case (the right of the wife to claim the arrears of maintenance under the separation agreement from her deceased's husband's estate) had been characterized as a "succession case". If that characterization had been made, the choice of law rule would have been that the law of the deceased's domicile at the date of his death governed the analysis.

4. On the assumption that the husband left an estate of $50,000, and that half went to his wife because of the application of the Québec rules regarding matrimonial property, the other half, we can assume, going either to the children of the marriage or being disposed of by the husband by will, calculate the absolute amounts that the wife and any other beneficiary would get under (i) the result of the case, and (ii) if Québec law had been held to apply.

5. Now calculate what the wife would have obtained if the whole estate and every question of succession were governed by Ontario law.

6. What do these results suggest about the justification for the decision of the Ontario Court of Appeal?

Imperial Life Assurance Co. v. Colmenares[1]
[1967] S.C.R. 443, 62 D.L.R. (2d) 138
(S.C.C., Cartwright, Fauteux, Martland, Ritchie & Spence JJ.)

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[1]The plaintiff's, respondent's, name is incorrect. The plaintiff's full name was, in the Spanish nomenclature, "Segundo Casteleiro y Colmenares". His surname in the English style should then have been, "Casteleiro".

> which was based on the case of *Varas v. Crown Life Insurance Company* (Superior Court of Pennsylvania, October term 1964) and which was accepted in Ontario and that treating this phase of the contract separately, it was to be regarded as governed by the law of that Province. It is true that the *Varas* case affords some authority for this proposition, but it appears to me that there is nothing in the circumstances of the present case to support the unprecedented proposition that the proper law of a continuing contract can shift from time to time. The proper law of these contracts is to be determined as of the date when they were made.
>
> In view of all the above, I would dismiss this appeal with costs.

NOTES

1. There have been a great many cases dealing with problems similar to that in *Colmenares*. Many have involved life insurance companies that issued policies in Cuba before Castro came to power. Those who bought such policies were likely to be people who would not sympathise with the Castro regime, and who, therefore were often emigrés from Cuba. Such people would be understandably anxious to obtain any assets wherever they could be found. Actions were brought against life insurance companies not only in Ontario (where many companies have their head offices), but in many American states. We shall look at the American solution to the problem later.

2. The issue in *Colmenares* was simple: which party should bear the risk of loss in the events that had occurred? Perhaps the insured, seeing the risk of revolution in the future, sought to protect himself and his family by having assets outside Cuba; perhaps the insurer thought that the risk of loss from something as remote as a communist revolution was not worth worrying about; perhaps both parties were simply caught by surprise. None of these facts change anything, except to the extent that they indicate how the risk of loss should be allocated. The choice of Ontario law as the proper law *does not* allocate that risk. Under Ontario law, the risk of foreign illegality making payment on a contract unlawful, is a risk inherent in any international contract and would be dealt with under the rubric of frustration or impossibility. (The English courts have had a long history of dealing with the consequences of exchange control laws.) In other words, we may respond to the conclusion that the contract is governed by Ontario law by saying, "So what, the question still is, who bears the risk of loss?" That question had to be answered whatever law was chosen. That question is the only question in the case and is not answerable by merely choosing a proper law. It is possible that the provisions of both Cuban law and Ontario law on the issue of frustration are the same. (We shall ignore the problems that might arise with this statement when Cuba was no longer a country with a market economy. It is safe to assume that for all societies that are based on markets there will have to be some law analogous to the common law concept of frustration.) After all, what is the common law rule regarding frustration? Is it

anything more than the statement that the court will allocate the risk that has arisen between the parties. We shall not examine that law in detail here. Whatever its theoretical basis the effect of any decision in a case in which one party claims to be excused from performance by the occurrence of some event, the destruction of a music hall, royal appendicitis, or foreign nationalization orders, allocates the loss caused by that event to one or other of the parties, or in some rare case, where the loss may be shared, to both parties. We happen to believe that the risk of loss should have been borne by the insurer on the ground that it almost certainly did business in Cuba using its Canadian base as a way of encouraging Cubans to invest in it. This question was never examined by the court with the result that we have a judgment that does not deal with the only issue that had to be decided.

3. It is worth pointing out that Canadian life insurers were not unaware of the problems of doing business in Cuba. It became common for Canadian life insurers to provide that payment on their policies issued in Cuba could only be made in Havana. The effect of this provision was to prevent actions in Canada similar to that in *Imperial Life*. A similar case is *Arnoldson v. Confederation Life Insurance Association* (1973), 2 O.R. (2d) 484, 43 D.L.R. (3d) 324, reversed, (1974), 3 O.R. (2d) 721, 46 D.L.R. (3d) 641. (The case is not a satisfactory authority. The trial judge had allowed the plaintiff's motion for judgment on a specially endorsed writ, i.e., for summary judgment. This decision was reversed by the Court of Appeal which held that there should be a trial. There is no report of a trial judgment.) The effect of the Court of Appeal's judgment was to allow the insurer to raise as a defence in an action on a Cuban life insurance policy, the fact that the policy, issued in 1934, provided, "All payments . . . shall be made in the City of Havana, Republic of Cuba". If we assume, as is likely, that the action, had it gone to trial, would have been dismissed, the interesting contracts point raised is that the insurer was able to allocate the risk of loss from foreign exchange control legislation by such a simple device as a place of payments clause, when other clauses that do no more than allocate a risk of loss to one party which, were it not for the clause, would be on the other party, are routinely denounced as "exemption clauses" and restrictively interpreted. It is probable that Señor Arnoldson was no less surprised and disappointed by the court's interpretation of the policy than were any of the victims of exemption clauses before they were rescued by Lord Denning and the Supreme Court of Canada with the battle cries of "fundamental breach" and "*contra proferentem*" ringing across the court room.

4. Another equally curious aspect of the litigation is that, as we have already mentioned, there was (and is) a Canadian statute, the *Bretton Woods Agreement Act*, R.S.C. 1952, c. 19, s. 3. (now R.S.C. 1985, c. B-7, s. 5) which made the terms of the Bretton Woods Agreements part of the law of Canada. Article VIII(2)(b) of the Bretton Woods Agreement provided:

> Exchange contracts[2] which involve the currency of any member and which are contrary to the exchange control regulations of any member maintained or imposed consistently with this agreement shall be unenforceable in the territory of any member.

The Act provides:

> On and after the 27th day of December 1945, the first sentence of paragraph 2(b) of Article VIII of the Agreement . . . has the force of law in Canada.

When the litigation against Imperial Life was begun, Cuba was a member of the International Monetary Fund. Cuba left the IMF on April 2, 1964, two and a half years after the plaintiff had made a formal claim for the cash surrender value of the policies, but before the judgment of the trial judge. No reference to the *Bretton Woods Agreement Act* was made by any Canadian court. The act would suggest that the result in *Imperial Life* should have been different, but if so, it would be as a result of the application of the law of Canada which, in this situation, allocates the risk of loss to the party who would seek to avoid the exchange control laws of another member of the IMF.

5. It may have been, of course, that the Act was not relevant since, at the date of the trial, Cuba was no longer a member of the IMF. It might have been expected that there would have been a reference to the legislation: it could not have made the insurer's position worse. There were a large number of similar American cases and, while the pattern is not entirely consistent, the courts tended to side with the insurer while Cuba remained in the IMF, and with the insured afterwards. Many of the United States defendants were Canadian life insurance companies. The judgment of the Supreme Court mentions one American case, *Varas v. Crown Life Insurance Co.* (1964), 203 A. 2d 505, (Superior Court of Pennsylvania) in which explicit reference was made to the American equivalent of the *Bretton Woods Agreement Act*. *Varas v. Crown Life* makes the risk allocation inherent in the decision more obvious than does the Supreme Court, but the Supreme Court only refers to the case in the context of a curious contracts argument, *viz.*, that the contract to pay the cash surrender value was a contract separate from the policy and, under the normal rules of offer and acceptance, since that contract was made in Ontario, Ontario law applied.

6. British Columbia's *Insurance Act*, R.S.B.C. 1979, c. 200, s. 7

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[2]There can be a dispute whether the contract in issue is an "exchange contract" or not. There are English cases on the point: see, e.g., *Sharif v. Azad*, [1967] 1 Q.B. 605; [1966] 3 All E.R. 785 (C.A.), *Wilson, Smithett & Cope, Ltd. v. Teruzzi*, [1976] Q.B. 683, [1976] 1 All E.R. 817, and *United City Merchants (Investments) Ltd. v. Royal Bank of Canada*, [1983] A.C., 168, [1982] 2 All E.R. 720, [1982] 2 W.L.R. 1039 (H.L.). It is not relevant to the argument in this paper whether the life insurance policies in *Imperial Life* were or were not "exchange contracts".

reads: "A contract insuring a person domiciled or resident in the Province at the date of it, or the subject matter of which is property or any interest in property situated in the Province, shall be deemed to be made in the Province and shall be construed accordingly." Given what *Colmenares* says about the significance of the place of contract does this provision mean that all insurance contracts for B.C. residents are governed by the law of that province? What if the parties should stipulate for another province's law? What if the policy should contain a clause like that found in *Arnoldson*?

Ralli Brothers v. Compania Naviera Sota y Aznar
[1920] K.B. 287
(C.A., Lord Sterndale, M.R., Warrington & Scrutton, L.JJ.)

[An English firm, carrying on business in London, chartered a ship to carry a cargo of jute from India to Spain. The charterparty set out the freight payable and provided for arbitration in London in the event of a dispute. The charterparty provided that half of the freight was to be payable in Barcelona. After the charterparty was made but before any amount of the freight became payable in Barcelona, the Spanish government established a maximum amount that could be paid on the shipment of jute—an odd form of governmental interference in the market, though, perhaps, not surprising to Canadians. The umpire who found the facts held that it would be illegal to pay more freight than the amount specified by Spanish law. The trial judge, Bailhache J., on an award stated by the umpire, held that freight in excess of the limit set by Spanish law could not be claimed. The owners appealed.

[LORD STERNDALE, M.R., said, "I have no doubt that it was an English charter and governed by English law". He nevertheless held that the charterers were excused from payment of the full amount of the agreed freight by the Spanish legislation.]

WARRINGTON L.J. . . . Bailhache J. has adopted the contention that [the charterers] cannot be called upon to pay any larger amount of freight than that allowed by the Spanish law. The owners appeal.

[The charterers] contend that the contract is an English contract to be construed and to have effect according to English law; that according to its true construction it contains an absolute obligation on the part of the charterers to pay the freight fixed by the contract; and that although it contemplates the payment by the receivers of the cargo in Spain and it may be unlawful under Spanish law for them to pay it, this does not *affect the obligation of the charterers.*

The charterers on the other hand contend that though the contract as a whole is an English one the performance of it in the material respect was to take place in Spain; that the only obligation as to the balance of the freight was that it should be paid in Spain by the Spanish receivers of the cargo; that such an obligation ought to be held to be subject to an implied condition that such payment should not be illegal by Spanish law, and that if it is they cannot be required to pay.

> If I am asked whether the true intent of the parties is that one has undertaken to do an act though it is illegal by the law of the place in which the act is to be done, and though that law is the law of his own country; or whether their true intent was that the doing of that act is subject to the implied condition that it shall be legal for him to do the act in the place where it has to be done, I have no hesitation in choosing the second alternative. "I will do it provided I can really do so" seems to me infinitely preferable to and more likely than "I will do it, though it is illegal." . . .
>
> [W]here a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent States . . .

NOTES AND QUESTIONS

1. To what extent can the decision of the Court of Appeal be seen as simply a decision on the English law of frustration?

2. Is the approach of the Supreme Court of Canada in *Colmenares* consistent with that of the Court of Appeal in *Ralli Bros*? The judgments in the latter case focus on the allocation of the risks created by supervening illegality. Does the focus on the proper law in the former case deal (except incidentally) with the question of the allocation of the risk of supervening illegality?

3. Does the different contract term in *Arnoldson* justify a different result? In other words, if the risk in *Colmenares* is on the insurer, should the changed wording in *Arnoldson* be regarded as sufficient notice to the insured that the risk should now be differently allocated?

4. On whom *should* the risk fall in each of these cases? What factors do you consider sufficient to justify the conclusion that you have reached?

Chapter 3

Choice of Law in Torts

INTRODUCTION

The problems of contracts, as we have seen, are characterized by a general agreement on the part of all jurisdictions that the law of contracts has to forward some general social policies. It is a fact that, apart possibly from some consumer transactions, the laws of almost all countries in the world are and must be nearly the same on the rules to be applied to the ordinary commercial contract. This statement does not claim that the rules are both identically expressed and applied in all jurisdictions: it claims only that there must be roughly similar rules for the making of contracts, for their interpretation and construction, for the existence of excuses for non-performance, and for the remedies on breach. It is unimportant that one jurisdiction may put the risk of loss arising under the "postal acceptance rule" on one side rather than the other, or that one jurisdiction may be less, or more willing to excuse a party from further performance on the ground that performance has become more onerous than was expected when the contract was made. Differences over the methods of quantifying losses, while practically important for the parties, are insignificant in terms of theory, and do not invalidate the claim that all jurisdictions must provide some mechanism for giving compensation to the party who has been injured by the other's breach of contract.

In tort, on the other hand, the differences between the rules of different jurisdictions are significant, and they extend to the fundamental purposes of each tort regime in each of the jurisdictions with which we shall be concerned. We shall see obvious problems arising from the need to accommodate in a "fault" based system, rules derived from a system of "no-fault" liability. Similarly we shall see problems arising from the interaction of rules which, from the point of view of one jurisdiction are clear anachronisms, but which are still in full force (in theory at least) in another.

You may remember the attempt by those acting for the injured parties in the Bhopal tragedy to bring that litigation in courts of the United States. That attempt was motivated by two factors: the very wide American rules for obtaining evidence, and the far more generous level of compensation in America than in India. Such procedural differences might exist in a contracts case, but except, perhaps, in a case coming close to one of manufacturer's liability, they are probably unimportant. The tremendous differences in the amount of recovery by those injured in the Bhopal tragedy depending on where the action was brought, would almost certainly not exist in a contracts case. That difference expresses divergent ideas about the measurement of human suffering and loss in financial terms, and says much about the whole pattern of comparative social relations, the need for economic incentives for development, the underlying insurance effects and the methods used to provide compensation for suffering and loss in India and America.

It will be useful, therefore, to spell out some of the underlying theoretical issues that can arise in a torts claim.

The Criminal Element

It may have been true some centuries ago in England that a tort claim made by a plaintiff had a large criminal element. That is to say, a tort, while being the basis for the plaintiff's obtaining compensation—the essence of a civil claim—from the defendant, may also have necessarily involved some kind of criminal conduct on the part of the defendant. An action in trespass involved an allegation in the plaintiff's pleadings that the defendant had, "*vi et armis*" and "*contra pacem regem*", committed an assault on the plaintiff, or had trespassed on his land or wrongfully taken his goods. The "criminal" element in tort claims may survive even today to some extent in the so-called "intentional torts", where punitive damages are allowed. Such claims are now a tiny proportion of modern tort claims.

We see hold-overs from the early notion that tort liability shared some of the features of criminal liability in the traditional English choice of law rule—at least that is one of the more plausible theories to explain its origin. From this point of view, it is not irrelevant that the leading case involved a claim for damages for false imprisonment and assault.

Fault and No-Fault

Most tort claims now arise from negligent conduct, or from those still special cases where some kind of strict or "no-fault" liability is imposed. Vicarious liability, the liability of the "master" for the torts of the "servant" acting within the course and scope of his or her employment, is one of the most important loss distribution mechanisms the law of tort possesses. It is a form of strict liability or "no-fault" liability: the plaintiff has only to show that the employee (to use the modern word) was negligent and that the relation of the employer and employee was such that the former would be vicariously liable ("responsible" is probably the better word). No allegation or finding of fault on the part of the employer is necessary. Difficult problems arise in the "conflict" between fault based regimes, i.e., those where liability depends on proof of "fault", and those with strict liability, or where no proof of fault is required.

A large area with potential for serious conflicts problems is that dealing with compensation for death or injury caused by defectively manufactured goods. Some jurisdictions, Saskatchewan and New Brunswick among them, impose strict liability on manufacturers for products liability, while other provinces and jurisdictions do not. The "Dalkon Shield" and the "Thalidomide" tragedies and other actions against drug companies, asbestos manufacturers and now tobacco manufacturers present huge conflicts problems. The results in such actions may well depend on where the action is brought.

The mystery which we have to face is the continued adherence of both English and Canadian courts to the rule developed in two early cases which have become, in the mysterious processes of the common law, the "leading cases". Not only was there in one of them, as we have

mentioned, a claim based on assault and false imprisonment, but in the other there was a direct conflict between a fault based rule and one imposing strict liability. It is hard, as we shall discover, to explain the continued status of these two cases as "leading cases" in an era when we are justified in assuming that one of the most difficult problems in the area of torts now is the need to reconcile fault based liability (negligence) with no-fault based liability in one of its modern forms.

The theoretical problems arise from the need to find a justification for fault based liability and for liability that is either fully "no-fault" as in some modern automobile liability regimes (e.g., Québec) or as in the vicarious liability of a "master" (employer) for the tortious acts of its "servants", or "strict" in the sense of liability for defective products under the Saskatchewan and New Brunswick statutes (and similar statutes in other jurisdictions) that have been mentioned. Added to the problems of finding a justification for any kind of liability is the need to justify the extent of liability imposed. What do we do if, as the Bhopal actions indicated, we find that the amount of damages available in one jurisdiction for a tort is significantly less than that available in another?

These needs to find some kind of satisfactory basis for what we do will force us to consider both moral and economic justifications for tort liability. If we believe that tort liability is based on the need to reflect Aristotelian concepts of corrective justice, we may find that one approach to what we could do appears more easily justifiable than another. Similarly, if we believe that we can identify the "least-cost avoider", and if we believe that that basis provides a justification for what we do, we may have a method for dealing with some of the conflict problems that arise.

It is clear beyond all doubt that there is an inescapable need to consider carefully the theoretical basis for what we *want* to do, and to have some idea of how that basis helps us towards a solution of the problem with which we are faced. It is also clear that tort rules are at least as much influenced by social policy as any other area of the law and that they are used to achieve some social objective. It is an important and difficult problem to decide how far a person who is not "subject" (a term that will itself have to be carefully defined) to a particular political or legal regime can justifiably be forced to help forward its policies.

A SUMMARY OF THE DEVELOPMENT OF MODERN TORT CHOICE OF LAW RULES

It is unnecessary to examine at length many of the cases that establish the choice of law rule in torts. The following is offered as a summary of the law as it was before the first case that is excerpted. The cases that follow that case are examples of the development of the rules that have been established.

There are four possible choice of law rules that have been generally accepted as providing the connecting factor for torts cases. These rules are different formulations of the choice of law rule in the same way as there are different formulations of the proper law in contracts cases. These

rules are:

(a) The law of the place where the tort was committed. This rule is expressed in latin as the *lex loci commissi* or as the *lex loci delicti commissi*. The abbreviation, *l.l.d.* is used to refer to both. In most cases it is clear *where* a tort is committed: the automobile accident occurred at Charles St. and Queen's Park. In others, and these are often the conflicts cases, it is unclear where the tort was committed. A car is defective, it was assembled in Oshawa from parts manufactured in Ohio, and gives rise to an accident in Saskatchewan. It is generally held for the purposes of this choice of law rule that a tort is committed in the place where the injury occurs.

(b) The law of the place where the act giving rise to the injury occurred. This law is referred to as the *lex loci actus*, or *l.l.a.* It is often assumed that the *l.l.a.* and the *l.l.d.* are the same, or simply alternative ways of stating the same rule. They are not, and it is important to be aware of the need that occasionally arises to keep them distinct. A car that is defective may cause injury in Saskatchewan, but it may have been negligently manufactured in South Korea. The *l.l.d* is Saskatchewan, but the *l.l.a.* is South Korea.

(c) The "proper law of the tort". This rule is a suggestion of Dr Morris, the late principal editor of *Dicey & Morris*. It is based on the argument that the rule in torts should be the same as that in contracts. The suggestion would have the courts doing the same kind of analysis in torts cases that they now do in contracts cases—with what jurisdiction has the tort its closest and most real connection? We shall examine this rule later. Part of the attractiveness of this rule for its proponents is that in *Dicey & Morris*, as in other Conflicts texts, the headings of "Contract" and "Tort" are often contained in one Part, usually referred as "The Law of Obligations". The combination of contracts and torts in this way is one example of the Civilian influence on Conflicts. A person knowing only the common law tradition would not normally put contracts and torts together. (What we do with the collapse of the distinction between contracts and torts in modern Canadian law is something that you will have to worry about, particularly for assignments and exams.)

(d) The law of the forum, the law of the place where the action is brought, the *lex fori*. As we shall see this is the rule that, in spite of some appearance to the contrary, is the generally accepted rule in the Anglo-Canadian tradition.

The almost universally accepted statement of the present law in Canada is the "double-barrelled" rule laid down by Willes J. in *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1. The case arose out of the savage repression of a rebellion in Jamaica. The defendant was the Governor at the time, and the plaintiff had been imprisoned by the forces used by Eyre to suppress the rebellion. The last Act of the colonial legislature of the island had been to pass an *Act of Indemnity* for the

Governor, absolving him of all liability for what he had done in putting down the rebellion. After the Act had been passed, the Governor dissolved the Legislature. The plaintiff brought his action in England (where it was a *cause célèbre*) claiming damages against Eyre.[1] At issue in the case was the effect of the *Act of Indemnity* on the claim brought by the plaintiff. In dismissing the action, Willes J. said: (pp. 28-29)

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . Secondly, the act must not have been justifiable by the law of the place where it was done.

Before we consider the contribution of this statement to the decision in the case, we must notice some things about the statement itself. The first part of the rule is said to require actionability by the *lex fori*—the law of the court trying the case. The second part is said to require "non-justifiability"[2] by the *lex loci actus*—*not* the *l.l.c.*—the law of the place where the act giving rise to the claim occurred.

Few judicial statements have been subjected to so much critical and judicial analysis as this statement by Willes J. (see *Dicey & Morris*, pp. 1358-1422, where the cases are collected). Almost always the words have been regarded by both judges and academics as possessing nearly statutory force. This force amounts sometimes to that possessed by some kind of holy writ. The words have been defined, explained, disapproved, applauded and condemned, but nearly always adopted as stating the common law choice of law rule for torts.

It is worth noting that the so-called statement of the "rule" in *Phillips v. Eyre* is not even the ratio of the case. In the paragraph in his judgment immediately preceding the "rule", Willes J. said: (p. 28)

> A right of action, whether it arises from contract governed by the law of the place, or wrong, is equally the creature of the law of the place and subordinate thereto. . . . And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law.

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[1]The story of the rebellion and of the Governor, Edward John Eyre (1815-1901), is fascinating. Eyre was an early explorer of Australia, giving his name to Lake Eyre and other landmarks. He was known as a friend of the Aborigines and he wrote extensively on Australian geography. After a term as lieutenant governor of New Zealand, he became governor of Jamaica in 1864. The rebellion he suppressed broke out in 1865. Eyre was recalled in 1866, in part in response to the efforts of those who later supported Phillips. The action brought by Phillips attracted great interest in England. Phillips was supported by people like J.S. Mill, Herbert Spencer and Goldwyn Smith, while Eyre was supported by Tennyson, Thomas Carlisle, John Ruskin and Charles Kingsley. One consequence of the affair was that it contributed to the fall of the government of Lord John Russell in 1866.

[2]This word is awkward but, as we shall see, attempts to find alternative ways of phrasing Willes' statement have, more often than not, created more problems than they have solved.

This statement subtracts from the force of "actionability" in the first rule and adds something to "non-justifiability" in the context of the second. The significance of this statement has never been adequately explored in judgments which have purported to follow *Phillips v. Eyre*.

The decision to dismiss the action brought by the plaintiff could be based on either statement. The quotation we have put second is sufficient to justify the decision. It is important to notice that the word "justifiable" in the first quotation is particularly appropriate in referring to the defence based on the *Act of Indemnity*. The effect of that Act was to "justify" (and to protect from legal consequences) the acts of Governor Eyre in suppressing the rebellion. Later cases that have applied Willes' statement have seldom made any attempt to take account of this fact.

The "First Rule" in *Phillips v. Eyre*

It is sometimes argued (e.g. by Spence, "Conflict of Laws in Automobile Negligence Cases" (1949), 27 *Can. Bar Rev.* 661 and Yntema, "The Objectives of Private International Law" (1957), 35 *Can. Bar Rev.* 721) that the first rule is a jurisdictional rule, that is, a rule limiting the court's jurisdiction to hear a case unless the tort be actionable in England (or Ontario). This suggestion has been made by several writers over the years, but is not now generally accepted. The main strategy behind the attempt to argue that the rule in *Phillips v. Eyre* is a jurisdictional test rather than a choice of law test is that if it is the former (and if the plaintiff's cause of action is lucky enough to clear both hurdles of the test) the court is then free to select another, more sensible choice of law rule. It is difficult to see why peculiar and special tests should be introduced in torts cases which are not present in other conflicts cases and why this rule should, so to speak, be sprung on us by Willes J. without any prior warning.

The result of the cases and the consensus of the writers at the moment indicate that the first rule is a choice of law rule, a rule requiring the plaintiff to show that he is entitled to a remedy by the law of the place where the action is brought. But even this conclusion is not free from difficulty. There have been suggestions made that the rule is nothing more than a rule of public policy (Kahn-Freund, "Reflections on Public Policy in the English Conflict of Laws" (1953), 39 *Tr. Grot. Soc.* 39). In this view, the first rule would only exclude those foreign rules that are obnoxious to English (or Canadian) notions of fairness, justice or morality, so that to apply the foreign rule would be an abuse of the process of the court.

The case cited by Willes J. in support of the first rule stated in the first quotation above is *The Halley* (1868), L.R. 2 P.C. 193. This case was decided two years before *Phillips v. Eyre* by the Privy Council on appeal from the High Court of Admiralty. That action arose out of a maritime collision in Belgian waters. At the time of the collision, the "Halley", the defendant "ship", was under the control of a "compulsory" pilot, a pilot that the master of the ship was compelled by Belgian law to have on board, and whose negligence caused the collision. Belgian law made the owners of the ship liable for the negligence of the pilot. At the date of the trial and appeal, English law did not make the owners of a ship liable for the negligence of a compulsory pilot. (English law was changed soon after the decision in *The Halley*.) The issue before the Privy Council was whether this Belgian rule for loss distribution should be enforced

or not.

The language of Selwyn, L.J., giving the opinion of the board, strongly supports the argument that the court regarded the application of the foreign rule as offensive to English notions of justice. Selwyn, L.J. said: (pp. 202, 204)

> [T]he question is, whether an English Court of Justice is bound to apply and enforce [the foreign] law in a case where, according to its own principles, no wrong has been committed by the Defendants, and no right of action against them exists. . . [I]t is in their Lordships' opinion, alike contrary to principle and to authority to hold that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages, in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.

The argument that the first rule is restricted to those cases where the application of the foreign law could be said to offend "public policy"[3] or the notions of justice of the court before which the action is brought cannot be accepted as the law now. It is generally accepted that the scope of the first rule is that the plaintiff must be able to show that it would have a good cause of action even if there were no foreign facts involved at all.

It is impossible to over-emphasize the importance of the statement that has just been made. In essence, the choice of law rule in torts is that the law of the forum (the *lex fori* or *l.f.*) applies to determine the validity of any tort claim. As a choice of law rule, this rule is radically different from the rule applied in contracts. The only scope for the foreign law is to offer the defendant an *additional* defence under the requirement that the act not be "justifiable by the law of the place where it was done". A situation where the foreign law gives a cause of action that the *l.f.* does not recognize, will not give the plaintiff any chance of using the foreign law to *extend* the rights given to plaintiffs by the *lex fori*. The foreign law operates *only* to give the defendant an additional defence. Determining the extent of that defence is one of the important aspects of the cases that follow.

(See also Hancock, "Torts Problems in Conflict of Laws Resolved by Statutory Construction: *The Halley* and Other Older Cases Revisited" (1968), 18 *U.T.L.J.* 331. Hancock, formerly a law teacher at Dalhousie Law School and then at Stanford, was one of the largely forgotten academics who did much to help develop the conflict of laws. His works have been recently

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[3]The phrase "public policy" must be used with care. Its use in a case like *The Halley* refers to those claims that are regarded by a court as offensive. A court has an inherent power to refuse to hear a case in which the plaintiff is making a claim that offends the court's sense of decency or propriety. A court would not, for example, hear a claim for the promised payment of a gangland "contract", any more that it would allow a person to sue for a bribe or any other illegal payment. In this sense the phrase denotes the limits of the courts tolerance for bad behaviour on the part of the plaintiff. The phrase is sometimes used more broadly to connote the general social policy of some legislation or of a common law rule. It is useful if we can confine the use of the phrase, "public policy", to the former situation and find more precise descriptions for the latter connotation.

collected and re-published as Hancock, *Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles* (New York: William S. Hein & Co. 1984).)

There have been comparatively few cases on the first rule but the Supreme Court of Canada has had to deal with it once, as has the High Court of Australia. The case in the Supreme Court of Canada involved vicarious liability. This is a particularly interesting problem for it is, of course, liability without fault and is to some extent technical in that the scope of vicarious liability is extended by statutes like the *Highway Traffic Act*. The case, *O'Connor v. Wray*; (reproduced, *infra*, page ?) arose out of the death of one pedestrian and the injury to another on the highway in Ontario. The defendant was the owner of the car. He lived in Québec and there the car had been lent to his employee for a trip (not on business) by the latter into Ontario. Action was brought in Québec. The plaintiffs sought to rely on the provisions of the *Highway Traffic Act of Ontario* (now, R.S.O. 1990, c. H.8 s. 192) which imposed liability on the owner for the negligent acts of anyone driving with his consent. There was no such provision under the law of Québec. The Supreme Court, on appeal from the Québec courts, refused to hold the defendant liable, on the ground that there was no liability by Québec law (assuming that all the facts had occurred in Québec).

It must, we believe, be inferred from this judgment (which quoted and relied on *Phillips v. Eyre*) that the imposition on the plaintiffs of the requirement that they satisfy the Québec rules was not a jurisdictional restriction. Similarly, such a requirement cannot be explained as being one of public policy. For if this phrase means something so abhorrent that the courts will not tolerate it, it is contrary to all the premises on which a federation is founded and on which the Supreme Court operates for the laws of one province to be so regarded by the courts of another. (How could the Supreme Court of Canada apply in a case from Ontario a rule that it had earlier said was abhorrent, even though that conclusion was reached in a case from Québec?) We are therefore left with the result that the plaintiff can only succeed if he or she can show that, had all the facts occurred in Québec, he or she would have had a good cause of action in that province.

The Australian case where the first rule was applied is *Anderson v. Eric Anderson Radio and T.V. Pty. Ltd.* (1965), 114 C.L.R. 20 (H.C.A.). (The similarity in names is purely coincidental: the parties had no connection with each other except for the accident that led to the litigation.) This case involved the particularly nasty and difficult problem of contributory negligence. The plaintiff had been injured in a traffic accident by an employee of the defendant company. He sued for damages in New South Wales. The accident had occurred in the Australian Capital Territory which had apportionment legislation while New South Wales did not. The latter jurisdiction had retained the old common law rule. (You will remember that such legislation permits the court or jury to reduce the recovery of the plaintiff in accordance with the respective degrees of fault of the plaintiff and defendant: it abolishes the absolute defence of contributory negligence.) The trial judge had directed the jury that they might apportion the fault. They did so: 90% to the defendant, 10% to the plaintiff. The plaintiff was therefore awarded 90% of his damages. On appeal, the High Court purported to follow *Phillips v. Eyre* and held that, since the defendant had an absolute defence by the *lex fori*, the plaintiff

had no cause of action and the defendant escaped liability.

The only possible conclusion we can draw from these cases is that the first rule in *Phillips v. Eyre* requires the plaintiff to prove that he has a cause of action under the *lex fori* no matter where the tort giving rise to the claim occurred.

Other Canadian courts have followed this formulation of the rule. Lieff J. in *Gagnon v. Lecavalier*, [1967] 2 O.R. 197 (H.C.) applied the rule to dismiss an action brought in Ontario by a gratuitous passenger who had been injured in an automobile accident that occurred in Québec. In 1963, when the accident happened, gratuitous passengers could not sue the driver (or owner) of the car in which they were riding: *Highway Traffic Act*, R.S.O. 1960, c. 172, s. 105(2). (This section has now been repealed.) We do not know enough facts about this case to know where the parties lived, but we can presume that the defendant, at least, lived in Ontario as he was sued there.

In no other area of conflicts does a plaintiff have to meet so severe a test as that, *no matter where the act giving rise to the claim for damages occurs*, he must prove that he could successfully sue on it in the place where the action is brought. In an action on a foreign contract, for example, the mere fact that the contract does not satisfy the requirements of Ontario law does not render it unenforceable in Ontario. Similarly a foreign marriage, even though not in compliance with the *Marriage Act* of Ontario or with the common law, will normally be recognized as valid in Ontario.

The "Second Rule" in *Phillips v. Eyre*

The second rule in *Phillips v. Eyre* has caused far more difficulty for the courts than the first one. there have been more cases and far more confusion. There are three principal ways in which the second rule has caused difficulty. The first is when the act does not give rise to any civil liability but, for example, only criminal liability in the foreign country. The second is when the foreign law provides a defence (e.g., contributory negligence). The third is over the measure of damages.

The classic case on the first aspect is the curious case of *Machado v. Fontes*, [1897] 2 Q.B. 231 (C.A.). The plaintiff alleged that he had been defamed in Brazil. The defendant sought leave to amend his pleadings to add the allegation that, under Brazilian law, there was no civil cause of action for what the defendant had done. The only remedy was a criminal charge. The judge in chambers had allowed the application; the Court of Appeal allowed the appeal, holding that the allegation, even if true was irrelevant. Its proof would have no bearing on the outcome of the case. The Court of Appeal held that for an act to be "justifiable" it was not sufficient that no civil liability attached to it and that an action could be brought in England for an act which had only criminal consequences where it was done. This case has been more reviled than almost any other we know of, and may, finally, have been put to rest by the House of Lords (See *Chaplin v. Boys*, *infra*, page 11.). It has, however, been applied by the Supreme Court of

Canada, (*McLean v. Pettigrew*, [1945] S.C.R. 62; [1945] 2 D.L.R. 65, *infra*, p. ?) and may yet have some life in it.

It is probably analytically useful to keep the first two aspects (i.e., the question of the existence of a cause of action or a defence to a cause of action) of the second rule separate, but in practice the courts have not maintained the distinction. The Supreme Court of Canada when it referred to *Machado v. Fontes* in the case of *McLean v. Pettigrew* did so when the question was as to the effect of Ontario's notorious gratuitous passenger provision. The plaintiff in that case, a gratuitous passenger in the defendant's car, had been injured in an accident in Ontario. The journey had begun in Québec and all the parties lived there. The plaintiff sued in Québec and was awarded damages by the Supreme Court. The defendant had, in fact, been charged in Ontario with driving without "due care and attention" but he had been acquitted by the magistrate. The Supreme Court regarded this as irrelevant and found that the defendant had driven without due care and attention and held that such conduct was not "justifiable" and so the plaintiff's action could be maintained.

The third aspect of the second rule has been considered by the House of Lords in what is now the leading case on torts in the conflict of laws. This case is reproduced immediately following this note. The result of the cases that have so far been discussed is to emphasize the importance of the first rule in *Phillips v. Eyre* and to establish its applicability in all cases coming before Canadian, English and Australian courts. The second rule has developed a gloss in that, while an act giving rise to civil liability, at least, in the foreign jurisdiction, will be actionable, defences available under the foreign law or more limited rights of recovery will normally be irrelevant. It is probable, as a result of some harsh words said about *Machado v. Fontes* in *Chaplin v. Boys*, that the former case is not good law on its narrow facts and that criminality alone may not be sufficient.

Chaplin v. Boys
[1971] A.C. 356, [1969] 2 All E.R. 1085. (House of Lords)
(Lords Hodson, Wilberforce, Guest, Donovan and Pearson.)

[The facts are taken from the judgment of Lord Hodson.]

The respondent, plaintiff in the action, was injured in a road accident in Malta caused by the admitted negligence of the appellant, defendant in the action. The respondent sustained serious injuries and sued for damages.

Under the Maltese law he could recover only financial loss directly suffered, expenses incurred and lost wages together with a sum for ascertained future loss of wages with a right to make a further application to the court if and when anticipated loss became actual. He could recover no damages in respect of the injury itself for pain, suffering and loss of amenities. In the result the trial judge awarded £53 special damages which would have been recoverable under Maltese law and £2,250 general damages for those injuries which would not be recoverable under Maltese law.

Both parties were serving in the forces of this country on October 6, 1963,

QUESTIONS AND NOTES

1. The speeches in *Chaplin v. Boys* make frequent references to American cases and authors. We cannot spend any time in exploring these views and these views should be largely ignored by you. They indicate that there are other possible points of view to adopt in conflicts cases. The members of the House of Lords do not accept these views and we can only make the bald claim here that they do not understand them; they do not, in particular, understand that the American rules reject the jurisdiction-selecting approach of the traditional English rules. You should, therefore, view *Chaplin v. Boys* simply as part of the development of the law stemming directly from *Phillips v. Eyre*, and as being largely uninfluenced by transatlantic ideas.

2. The traditional *Phillips v. Eyre* rule is highly "forum centred". This means that the rules of the place where the action is brought are, in effect, almost entirely determinative of the result. Had *Chaplin v. Boys* been litigated in Malta, for example, it would not even have been seen as a conflicts case for, if the Maltese court were to apply *Phillips v. Eyre*, both parts of the rule would point to the application of Maltese laws and the English facts emphasized by the House of Lords would have been irrelevant. This potential difference in the results is sometimes regarded as a "bad thing" for it can lead to "forum-shopping": the selection of a favourable (or likely more favourable) forum by the plaintiff. One response to the problem of forum-shopping has been to suggest that the preferable rule should be "double-actionability". This proposal does not reduce the significance of the law of the forum, but it does increase the significance of the place where the act giving rise to the claim occurred. In this way it is believed that the goal of conflicts analysis—uniform results in similar cases regardless of wherever the action may be brought—can be achieved. The House of Lords in *Chaplin v. Boys* went some distance along the "double action-ability" road but clearly not far enough to ensure that the result in an English court would be the same as the result in a Maltese court.

3. If the House of Lords does not regard the goal of uniformity so highly as to require the plaintiff to prove that by Maltese law he would get what he is claiming, what goal does underlie the judgments? A possible clue to this goal might be found in the following case. Notice that Lord Guest (a Scottish judge) expressly approved of it in *Chaplin v. Boys*.

date complained of or at the date of the raising of the action. In the present case there are no sufficient averments. This, in my view is fatal to the widow's case.

Had there been a relevant averment of actionability under English law an interesting question would have arisen as to whether the pursuer was entitled to ask the Scots Court, as the Court entitled to deal with "remedy" immediately to proceed to assess damages in an ordinary action at the instance of the widow for patrimonial loss, or whether it was incumbent on the pursuer to aver and prove the character and scope of the rights conferred on her by English law on the basis of which the Scots court would ultimately assess damages. As this question does not arise, I express no opinion on it.

So far as the claim of the executrix is concerned, I see no difficulty in rejecting it. Actionability by the forum is a *sine qua non*. The executrix could not have insisted on this claim had she been suing in respect of a wrong committed in Scotland.

NOTES AND QUESTIONS

1. This was a seven judge court in Scotland. Only one judgment is reproduced above. The narrow issue before the court was whether the pursuer had to show that she was entitled to any remedy under English law or not. The decision of the court was that she had to show that her cause of action was maintainable in England as well as in Scotland. *Lord Keith* dissented on the question of the application of the limitation period under *Lord Campbell's Act*—the English equivalent of the *Fatal Accidents Act*—and on the question whether the pursuer had to be able to show that she could sue as executrix in Scotland. The effect of the decision is to require "actionability" by both laws—the *lex fori* and the law of the place where the wrong was done. In this case the *l.l.a.* and the *l.l.c.* coincide.

2. What reason does the Lord Justice-Clerk give for his decision?

3. The "double actionability" rule does not work very well here, does it? If it doesn't, what is wrong? Is it that one should not seek uniformity? If you think a Canadian court could not do anything as silly as the Court of Session did in *McElroy v. McAllister*, see *Simonson v. Canadian Northern Railway. Co.* (1914) 17 D.L.R. 516 (Man. C.A.).

4. The next cases are Canadian ones on the same issue. Consider how well the judgments either encourage or discourage forum-shopping.

> *France v. Perras*, [1943], 2 D.L.R. 129, S.C.R. 165). For my part, I am of the opinion, shared by the trial Judge and the Court of Appeal, that the appellant did not drive his car, with the "due care and attention" required by s. 27. For, it seems certain to me, that if he had shown due care and the necessary attention, this accident would have been avoided.
>
> There was evidently a lack of care and of attention in appellant's driving under the conditions which I mentioned previously, and I do not see how I could differ on this point from the opinion of the Judge of first instance and the Court of Appeal, whose judgments seem well-founded to me.
>
> . . .
>
> I am of the opinion that it has been shown that the plaintiff did not drive with the due care and attention required by s. 27 of the *Highway Traffic Act*, and hence that his act which resulted in serious bodily injuries to the respondent is punishable by virtue of the law of Ontario, where the quasi-delict took place. It is "wrongful" *i.e., "non-justifiable"* within the meaning of the authorities cited above.
>
> It follows that the respondent has established two of the conditions necessary to involve the responsibility of the appellant. The act with which she charges him is a quasi-delict for which damages could be obtained in the Province of Québec, if it had been committed in that Province. She has also shown that it is "wrongful" in Ontario because it is a violation of a provincial statute. The appellant cannot be exonerated and the appeal must be dismissed with costs.

NOTES

1. The special position of the Supreme Court of Canada in conflicts cases has never been fully explored. Consider the problem *McLean v. Pettigrew* as simply one of determining the correct interpretation of the Ontario *Highway Traffic Act*. The only issue before the Supreme Court is whether the Ontario guest passenger legislation applies to prevent *this* plaintiff from suing *this* defendant. Ontario law is, before the Supreme Court, not a fact as "found" by the trial judge, but a matter of law, which the Supreme Court can authoritatively interpret.

2. As we have noted, in an action in an Ontario court the laws of any province other than Ontario have to be established by expert evidence. The Supreme Court may, however, take judicial notice of the laws of all provinces. In *Logan v. Lee* (1907), 39 S.C.R. 311, counsel for the defendant in argument before the Supreme Court relied on the proof of the law of New Brunswick in an action brought in Québec. Sir Charles Fitzpatrick, C.J.C. interrupted counsel and said: (p. 313)

> I think it proper that I should here announce, after having consulted my brother judges, that this court, constituted as an appellate tribunal for the whole Dominion of Canada, requires no evidence as to what laws may be in force in any of the provinces or

> territories of Canada. This court is bound to . . . take judicial notice of the statutory or other laws prevailing in every province and territory of Canada, *sua motu*, even in cases where such laws may not have been proved in evidence in the courts below, and although it might happen that the views as to what the law might be, as entertained by the members of this court, might be [sic] in absolute contradiction of any evidence upon those points adduced in the courts below.

Logan v. Lee followed the decision of the House of Lords in *Cooper v. Cooper* (1883), 13 App. Cas. 88. This simple approach does not remove all problems but, on the facts of *McLean v. Pettigrew*, it might have permitted a solution based on an interpretation of the Ontario legislation that excluded its application to Québec defendants. Such a solution would obviously exclude any possibility of forum-shopping.

3. As the law now stands, it is, under *Phillips v. Eyre*, theoretically possible for an Ontario court to hold that, regardless of any foreign facts, the Ontario legislation (in the terms in which it was drafted in 1945) bars *all* actions in Ontario. This result vividly illustrates the extraordinary difference between the tort rules and the contract rules.

4. Taschereau J. states that "there is no ambiguity in the wording of the [Ontario] Act". This may be so in some odd linguistic sense, but does the statement correctly express the function of a court in interpreting the words of an act of the legislature? Is the question of the purpose of legislation nothing more that a question of resolving any ambiguity? This issue is an example of the problem of determining what the "law" of a province is. Is it that law considered as some abstract body of rules, divorced from any social context or is it the law in all its complexity: a striving to achieve some kind of acceptable order, predictability, fairness and justice? This issue cuts to the heart of what conflicts is all about. We shall return to it frequently.

5. Courts have never accepted the full consequences of *Phillips v. Eyre* when to do so would very seriously undermine important values. This fact has been particularly well demonstrated in a couple of early decision of the Privy Council on appeal from Canadian courts, though these cases tend not to be referred to often by Canadian judges today.

6. In *Walpole v. Canadian Northern Railway*, [1923] A.C. 113, 70 D.L.R. 201 (P.C.), the plaintiff's husband had been killed in British Columbia by the negligence of his employer, the defendant. British Columbia had workers' compensation legislation which prohibited any action by the injured worker or his dependents. The plaintiff sued in Saskatchewan where there was no such restriction. The Privy Council dismissed the claim on the grounds that the husband's contract of employment incorporated the provisions of the *Workmen's Compensation Act*, and that, applying *Phillips v. Eyre*, the act of the defendant

being neither actionable nor punishable in British Columbia, could not be anything but "justifiable". A broad definition of "non-justifiability" would clearly support the plaintiff's claim. What, after all, could be more explicit than the provisions of the Ontario act so easily circumvented in *McLean v. Pettigrew*?

7. *McMillan v. Canadian Northern Railway*, [1923] A.C. 120, 70 D.L.R. 229 (P.C.) was again an action by an injured worker against his employer. The worker had been injured in Ontario (where no cause of action lay by virtue of the *Workmen's Compensation Act*), and he also sued his employer in Saskatchewan. The only difference between the Acts of Ontario and British Columbia lay in the fact that in the former province, a claim for compensation under the Act was to be made against the employer, while in the latter province the claim lay against the Board. The Privy Council in this case adopted the reasoning of the Saskatchewan Court of Appeal which had relied on the "fellow servant rule" to hold that nothing the *employer* did was not "justifiable" in Ontario. This case is equally hard to reconcile with *McLean v. Pettigrew*.

8. How do any of these cases fit with *Chaplin v. Boys*?

9. See also: *Canadian Pacific Railway Co. v. Parent*, [1917] A.C. 195 (P.C.). A more recent example is *Sayers v. International Drilling Co. N.V.*, [1971] 1 W.L.R. 1176, [1971] 3 All E.R. 163 (C.A.)—another decision in which Lord Denning meant well!

O'Connor v. Wray
[1930] S.C.R. 231, [1930] 2 D.L.R. 899
(Anglin, C.J.C., Rinfret, Newcombe, Smith and Lamont, JJ.)

NEWCOMBE J.—The wife of the plaintiff, Walter O'Connor, and Mrs. Gertrude Boyd, the plaintiff of that name, were on Sunday afternoon, 11th July, 1926, walking together on the Montreal Road, in the province of Ontario, when they were both struck by an overtaking automobile, belonging to the defendant, and negligently driven by Ronald Cochrane. Mrs. O'Connor was instantly killed and Mrs. Boyd suffered painful and permanent injuries.

The defendant lives and carries on business at Montreal, in the province of Québec; and; at the time of the accident, Cochrane, was and has been for about three years, in the defendant's employ in the capacity of manager. I extract the following from the defendant's evidence:

> Q. As your manager, what kind of work was he called upon to perform?
>
> A. Well, he had complete authority over everything and had all my interest to look after. When I was not there myself he acted just the same as I would myself if I was not there during my business time.

[Rinfret agreed with Newcombe J. Smith J., with whom Lamont J. concurred, wrote a short opinion also agreeing with Newcombe J. Anglin J. dissented on the ground that Québec law was not as the majority saw it to be.]

NOTES

1. Notice how the decision of the Supreme Court in *O'Connor v. Wray* could be supported simply on the basis that the Ontario legislation did not apply: as such it would be a solution based on what we suggested could have been the basis for a decision in *McLean v. Pettigrew*. That is, the court could simply have decided that, in the circumstances of this case, it was not the purpose of the Ontario statute to apply to owners of vehicles who were Québec residents.

2. The more important aspect of the case appears if we assume that, disregarding for the moment the foreign facts, the Ontario legislation would operate to make the defendant owner liable. The current provisions are: *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 192(1)

> The owner of a motor vehicle . . . is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle . . . on a highway unless the motor vehicle . . . was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle . . . not being the owner is liable to the same extent as the owner.

3. The issue then becomes one of considering what Newcombe J. meant, or should be taken to mean, when he said that he was "not satisfied that the defendant ever became subject to the *Highway Traffic Act* of Ontario". It is this aspect of the case that we will focus on later. The case is, from this point of view, a paradigm or archetype of a very important class of cases. The special feature of the case is that, as a case of vicarious liability, it presents the classic problem of determining which of two innocent people shall suffer for the misdeeds of a third. This problem is difficult enough when the facts are not geographically complex: it becomes very much more difficult when there are geographically complex facts.

4. Consider the position of the Supreme Court if the argument that the first rule in *Phillips v. Eyre* is a rule reflecting only the public policy of the forum, i.e. that the foreign law is so offensive that the court will not give effect to it. Is such a response to the law of another province permissible in a court of one province? Is such a response permissible in proceedings before the Supreme Court?

In recent years there have been signs of a shift in the application of *Phillips v. Eyre* in Canadian (or at least Ontario) courts. This shift appears to have been prompted by the enactment by Québec of the *Automobile Insurance Act*, R.S.Q. 1977, c. A-25, which came into force on March 1, 1978. The effect of this legislation was to set up a tax-funded body to compensate persons injured in automobile accidents regardless of fault. Compensation would be paid according to a set scale, which provided for payments which were lower than would normally be awarded by a court which had found delictual responsibility under the old regime. The statute also eliminated all causes of action in respect of bodily injury caused by an automobile. The drafters of the statute made some attempt to anticipate problems which would arise from territorially complex cases. The statute provided that victims of accidents which occurred in Québec who were not Québec residents would be compensated to the extent they were not responsible for the accident. In other words, non-residents lost the right to sue in delict but were still subject to fault-based limitations when they attempted to recover for injuries which they might have suffered.

The province of New Brunswick hit upon a unique and most unfriendly way of responding to the problems caused by Québec's no-fault scheme. Since it was possible that New Brunswick residents injured in Québec might not be able to get full recovery against "negligent" Québec driver or owner (due to Québec's statute barring such actions) the New Brunswick legislature enacted a "revenge statute" blocking any Québec plaintiff who might be injured in a New Brunswick auto accident from obtaining full recovery. It did this by adding to its *Motor Vehicle Act*, R.S.N.B. 1973, c. M-17, the following provision:

> 266(2) . . . no person shall have a greater right of recovery resulting from the negligent operation of a motor vehicle or farm tractor in this Province, than that person would have in the jurisdiction in which he ordinarily resides, and in no event any greater right of recover, than a person resident in this province would have in such other jurisdiction. (S.N.B. 1978, c. 39, s. 17)

The effect of this would be to give Québec residents injured in New Brunswick the worst of both worlds in a New Brunswick court. The plaintiff would have to prove the defendant was negligent but would be limited to the lower measure of damages provided by Québec's no-fault scheme.

More significant here is the response of the courts of the other provinces which did not enact statutes like New Brunswick's, particularly that of the Ontario courts. The initial response was to apply the traditional choice-of-law rule as interpreted by the Supreme Court in *McLean v. Pettigrew* (*supra*). A good example of such an approach is the decision of the Ontario High Court in *Going v. Reid Brothers Motor Sales Ltd. et al.* (1982), 35 O.R. (2d) 201, 136 D.L.R. (3d) 254. There the plaintiffs were Ontario residents who had been injured in an automobile accident in Québec. The defendant Fraser was a Québec resident.

The court found that Fraser's conduct was "negligent" by Ontario standards. It also found that he would have been guilty of careless driving under Québec's *Highway Traffic Code*. Henry. J. continued (at 208 O.R., 265 D.L.R.):

> His conduct was therefore wrongful and was not justifiable within the meaning of the second condition in the Anglo-Canadian rule. Both conditions under the rule are therefore met, and both liability and damages for personal injury and property damage are properly to be determined by this Court according to the law of Ontario.

The effect of this approach was that Québec residents driving in their own province (which had abandoned fault-based liability for automobile accidents) could still be found liable before the Ontario courts, and that Ontario residents were able to "carry the tort regime with them" when they went to Québec. The provinces of Ontario and Québec attempted to remedy this unhappy situation by entering into an executive agreement. Ontario agreed to amend its *Insurance Act* to require insurers to make no-fault payments to Ontario insureds who were injured in Québec at a level equivalent to payments made under the Québec no-fault system. There were also provisions dealing with the problem of Québec motorists driving in Ontario. Alberta and Québec entered into a similar agreement.

However in a series of decisions the Ontario courts held that this agreement did not eliminate the right of persons to bring tort actions in their home province in respect of automobile accidents in Québec: *Duncan v. Mayhew* (1983), 44 O.R. (2d) 65 (H.C.); *Lewis v. Leigh* (1986), 54 O.R. (2d) 324, 26 D.L.R.(4th) 442 (C.A.); and *Ang v. Trach* (1986), 57 O.R. (2d) 300, 33 D.L.R. (4th) 90 (H.C.). In the last-mentioned of these cases Henry J. made the following observation about holding a Québec "tortfeasor" liable for an automobile accident in that province (at 317 O.R., 107-8 D.L.R.):

> His reasonable expectation in the course of everyday driving in his home province is that where he commits a tort or delict, he cannot be sued by the victim who is to be compensated for any injury by the regié, without proof of fault on his part, not can he sue the tortfeasor who injures him. But if by chance he injures an Ontario resident who is sojourning there, he finds himself subjected to possible liability and damages in an Ontario court in accordance with Ontario law, which is a regime of law in direct conflict with that of Québec which would otherwise protect him. That seems unfair to him by any reasonable test.
>
> Second is the constitutional question raised by Professor Swan ["The Canadian Constitution, Federalism and the Conflict of Laws" (1985, 63 *Can. Bar Rev.* 271] which I suggest in the context of the Canadian polity is one rather of comity between provinces than extraterritoriality, which I would apply as between sovereign States. The question is whether one province in applying its own laws, ought to ignore the policy of another as expressed in its legislation.

> In the case at bar, it is the policy of Ontario to apply the common law of tort in Ontario, even though it emasculates the Québec statute law designed to extricate the Québec resident from legal liability in return for a scheme of no-fault compensation to the victim.

Despite his reservations about the effect of the traditional choice of law rule Henry J. felt bound by *McLean v. Pettigrew* and held the Québec resident liable.

The change that was mentioned above appears in the following two decisions of the Ontario Court of Appeal.

Grimes v. Cloutier
(1989), 69 O.R. (2d) 641, 61 D.L.R. (4th) 505
(Ont. C.A., Morden, Robins & Griffiths JJ.A.)

> [The plaintiff was an Ontario resident injured in an automobile accident in Québec. The Québec defendants, were the owner and driver respectively of the other automobile involved in the accident, and the latter was charged with and later convicted of careless driving in breach of the *Highway Traffic Code* of Québec. The judge at trial felt bound by *McLean v. Pettigrew* and applied Ontario law. The defendants appealed.
>
> [MORDEN J.A. delivered the judgment of the Court of Appeal. After dealing briefly with the question whether the court had jurisdiction to entertain the action he turned to the choice of law question:]
>
> The substantial issue in this appeal is whether the judgment of the Supreme Court of Canada in *McLean v. Pettigrew* . . . requires us to uphold the judgment against the appellants notwithstanding that (1) they are Québec residents, (2) the accident occurred in the Province of Québec and, (3) under Québec law they are not civilly liable. As indicated in the third and fourth questions in the agreed statement of facts, there are contingently separate additional issues raised respecting the liability of the owner of the motor vehicle, Marie Cloutier, by virtue of s. 166(1) of the *Highway Traffic Act* of Ontario and the claims under s. 60 of the *Family Law Reform Act* of Ontario.
>
> As a prelude to considering *McLean v. Pettigrew* it will be of assistance to quote again the statement of Willes J. in *Phillips v. Eyre* at pp. 28-29 and to refer to some subsequent judicial developments. The statement reads:
>
> > As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England;. . . Secondly, the act must not have been justifiable by the law of the place where it was done.
>
> In *Phillips v. Eyre* the second rule in this statement was applied in favour of the defendant. The Court of Exchequer Chamber, in an action brought in England, held that an Act of Indemnity enacted in an English colony after the events in

admitted before any court of justice.

There is another reason why, in my view, the law of the forum should not apply in the circumstances of this case, and that is that to do so would encourage forum shopping. In my opinion, the determination of the governing law in a tort case should not depend on the skill of the plaintiff in selecting a favourable forum.

To apply the law of the forum, that is the law of Ontario, to an action brought by Québec residents for damages resulting from a tort committed in Québec may, in some circumstances, produce an anomalous result. Assume, for example, that in the second action of *Cuddihey v. Robinson*, the defendant Joanne Robinson also sustained personal injuries which she alleged resulted from the negligence of the plaintiff Eric Cuddihey in the operation of his motor cycle. Assume further that Joanne Robinson brought a separate action (or counterclaim) against Eric Cuddihey as defendant and that the two actions were directed to be tried together in Ontario. On the basis of the decision of this court in *Grimes v. Cloutier*, the trial judge would be required to dismiss Joanne Robinson's action holding that Québec law applied. It would be difficult to justify a decision in the same proceeding that the claim of Eric Cuddihey as plaintiff should be governed by Ontario law and should succeed. It is obviously desirable that the court should reach the same decision in both actions, by applying the law of the place of the occurrence.

. . .

In the result, each action is dismissed but without costs.
There will be no order of costs of this appeal.

NOTES AND QUESTIONS

1. The rule which appears to emerge from *Grimes* and *Prefontaine* is that in choice of law cases in tort we should apply the rule in *Phillips v. Eyre* unless it leads to an unjust or unreasonable result. How is that different from saying that one should chose the law which leads to a just and reasonable result? In other words, why bother to consult the rule in *Phillips v. Eyre* at all?

2. One of the problems with the rule in *Phillips v. Eyre* is that a large number of factors which one might have expected to be relevant to a choice of law decision in tort were not considered pertinent: *e.g.*, the residence of the plaintiff, the residence of the defendant, the insurance background, the place where an automobile involved in the alleged tort was garaged and licence, etc. Such matters are now evidently relevant in assessing reasonableness and justness under the new approach of *Grimes* and *Prefontaine*, yet those decisions give us little guidance as to how those factors are to be treated. Does that mean that torts cases will now be approached much as the Court of Appeal dealt with the contractual dispute in *The Assunzione*?

3. The crucially important aspect of *Grimes v. Cloutier* and, to a

lesser extent, *Prefontaine v. Frizzle* is that they cast doubt on the entire choice of law process. We can see this if we ask the question: Can the choice of law structure be maintained if the courts begin, as Morden, and Griffiths JJ.A., do, to look at the expectations of the parties? Consider the implications of this question. What are (or what informs) the expectations of the parties? The parties' expectations must be largely determined by the legal regime in which they act: a Québec defendant does not expect to be liable to the full extent of Ontario common law damages because the injured pedestrian happened to come from Ontario. Seen in this light, the judgment of Morden J.A., is a "paradigm shift"—a radical restructuring of the underlying theory of the conflict of laws. Griffiths J.A., who was on the court in *Grimes v. Cloutier*, in giving the judgment in *Prefontaine v. Frizzle* follows the same route, though he does not see *Grimes v. Cloutier* as the shift we think it is.

4. Morden J.A., suggests that to apply the common law rule to the Québec defendant would be inappropriate. He says:

> In these circumstances, to ignore the Québec legislation, which relieves the defendants of civil liability, would be unfair to the appellants and, also, an "officious intermeddling with the legal concerns of a sister province". Hancock, *Studies in Modern Choice of Law: Torts, Insurance, Land Titles* (1984), p. 183.

What does it mean to call the application of Ontario law "officious" or "meddlesome"? What criteria have to be met before the application of Ontario could be so described? Would the criteria differ from what would be used to determine if the application of Ontario law in the circumstances violated the limits on provincial sovereignty under s. 92(13) of the *Constitution Act, 1867*?

5. *Grimes* and *Prefontaine* were considered in *Gagnon v. Gagnon* (1991), 3 O.R. (3d) 38, 28 M.V.R. (2d) 155, *sub. nom. Lucas v. Gagnon*, (Gen. Div., Hurley J.). There the accident took place in Québec and the plaintiffs were passengers driven in a car operated by an Ontario driver. They alleged negligence against their host driver who then cross-claimed against the driver of the other car involved in the accident, a car owned and driven by a person from Québec. In holding that Ontario law governed, Hurley J. wrote as follows:

> In my opinion the major considerations are these: the plaintiffs are residents of Ontario and domiciled in Ontario: the defendant is resident in Ontario and domiciled in Ontario, licensed to drive in Ontario, and insured in Ontario: in its essence, the trip in a car licensed in Ontario began in Ontario and it was intended to end in Ontario: the collision occurred in Québec. That the defendant in the cross-claim was domiciled in Québec, a resident there, licensed there, and the operator of a car which was licensed there is significant . . . but of lesser importance.

Does this remind you of the approach to choice of law in contract cases?

6. In *Buchar et al v. Weber et al.* (1990), 71 D.L.R. (4th) 544, (H.C.J., Montgomery J.), the court had to consider the purpose of Ontario law. The plaintiff was very seriously injured in Alberta by Alberta defendants. He was initially treated in Alberta, but was later moved to Ontario for treatment. Actions were brought in Alberta and Ontario; the insurer moved to have the Ontario action stayed or dismissed. It was proved that Ontario law was better for plaintiff—his relatives, for example, might be able to use *Family Law Act, 1986* and "ordinary" negligence only had to be proved against the defendants. The trial judge held that to apply Ontario law would defeat intent of Alberta legislation and the reasonable expectations of the parties and serve no valid Ontario purpose. In addition, the *forum conveniens* was also Alberta. Notice that in Alberta the case would not, under the rules of *Phillips v. Eyre*, even be a "conflicts" case. Had the case been heard in Ontario, would it have made any more sense then to apply Ontario law? The trial judge must have decided that it the scope of the Ontario legislation should be limited because the person who would be made liable would be caught by surprise. In other words, the legislation would not apply in this situation.

7. The thrust of the judgments in *Grimes v. Cloutier* and *Prefontaine v. Frizzle* has not always been carried through into other judgments. The most recent decision of the British Columbia Court of Appeal purports to apply *Grimes v. Cloutier.*

Tolofson v. Jensen et al.
(1992), 89 D.L.R. (4th) 129, 32 A.C.W.S. (3d) 45
(B.C.C.A., Hutcheon, Cumming and Hinds JJ.A.)

The judgment of the court was delivered by

CUMMING J.A.:

Facts

The plaintiff/respondent in this action, Kim Tolofson (the "plaintiff") is the son of the defendant/appellant Roger Tolofson (the "defendant Tolofson").

On July 28, 1979, the plaintiff was riding as a passenger in a car owned and driven by the defendant Tolofson. While driving on a visit to the Province of Saskatchewan they were involved in an accident with a vehicle driven by the other defendant/appellant (Leroy Jensen). At the time of the accident the plaintiff was 12 years old. He and his father were residents of British Columbia. The defendant Tolofson's car was registered and insured in British Columbia. The defendant Jensen was a resident of Saskatchewan and his vehicle was registered in that province.

As a result of the accident the plaintiff alleges he has suffered head injuries which have affected his learning capacity and physical capabilities.

made some recovery according to the laws of Quebec in respect of damages sustained and then sought to supplement recovery with the action in Ontario. In the present case the plaintiff has not, and probably would not, recover anything under the law of Saskatchewan. Finally, as the respondent notes, civil liability for this action might have been proven in Saskatchewan when the accident occurred and a suit might have been reasonably expected by all parties. It is not a case where a cause of action would have never arisen. Moreover, the one-year limitation period as it applied to infants in Saskatchewan at the time of the accident has since been repealed, as has the requirement of proving wilful and wanton misconduct on the part of the driver of the vehicle in which the gratuitous passenger was riding.

Finally, I would not wish to suggest that the decision of the Supreme Court of Canada in *McLean* may never be distinguished in British Columbia courts in respect of cases relating to the choice of law rules for tort. I would limit the present conclusion as to the binding nature of that decision to the facts of this case; other cases may lead to a different result. In addition, it obviously remains open to the legislature or the Supreme Court of Canada to alter the choice of law rules for any or all tort cases if such is deemed appropriate.

Since I have concluded that the laws of British Columbia are the laws applicable for disposition of this action, I do not consider it necessary to determine whether the Saskatchewan laws respecting limitation periods are to be considered substantive or procedural.

I would dismiss the appeal.

NOTES

1. Why should the same law be applied to both the British Columbia defendant and the Saskatchewan defendant? Suppose that only the Saskatchewan defendant had been negligent, would *Grimes* justify the application of B.C. law to him?

2. In *Grimes* Morden J.A. suggests the area is in need of legislative action. In 1966 the Uniform Law Conference of Canada proposed a *Foreign Torts Act* (Proceedings, 1966, p. 58):

Draft Foreign Torts Act

1. When deciding the rights and liabilities of the parties to an action in tort, the court shall apply the local law of the state which has the most substantial connection with the occurrence and with the parties, regardless of whether or not the wrong is of such a character that it would have been actionable if committed in this Province.

2. When determining whether a particular state has a

substantial connection with the occurrence and the parties, the court shall consider the following important contacts,

(a) the place where the injury occurred;

(b) the place where the conduct occurred;

(c) the domicile and place of business of the parties; and

(d) the place where the relationship, if any, between the parties is centred.

3. When deciding which state, among the states having any contacts within Section 2, has the most substantial connection with the occurrence and the parties, the court shall consider chiefly the purpose and policy of each of the rules of local law that is proposed to be applied.

Canadian provinces have not, up to now, been tempted to adopt this or any other statutory approach to choice of law in tort, though you should note the existence of the Yukon Territory's *Conflict of Law (Traffic Accidents) Act*, R.S.Y. 1986, c. 29, as an odd exception.

The Insurance Context

The standard Ontario automobile insurance policy, the standard endorsements and the uniform *Insurance Acts* of the provinces offer an interesting approach to "inter-provincial" torts and, by extension, a view of the cases that suggests quite different solutions.

The first point to notice is that an Ontario insured (the owner or driver), driving in another province, has coverage up to the minimum limits of that jurisdiction and is subject to the liability laws of that jurisdiction. This result is achieved by *Insurance Act*, R.S.O. 1990, c. I.8, which provides:

252(1) Every motor vehicle liability policy issued in Ontario shall provide that, in the case of liability arising out of the ownership, or directly or indirectly out of the use or operation of the automobile in any province or territory of Canada,

(a) the insurer shall be liable up to the minimum limits prescribed for that province or territory if those limits are higher than the limits prescribed by the policy;

(b) the insurer shall not set up any defence to a claim that might not be set up if the policy were a motor vehicle liability policy issued in that

province or territory; and

(c) the insured, by acceptance of the policy, constitutes and appoints the insurer his irrevocable attorney to appear and defend in any province or territory of Canada in which action is brought against the insured arising out of the ownership, use or operation of the automobile.

Clause (1)(c) is an effective way of avoiding problems of both obtaining service on a defendant and, at least until the decision in *De Savoye v. Morguard Investments Ltd.*, [1990] 3 S.C.R. 1077, [1991] 2 W.W.R. 217, 76 D.L.R. (4th) 256, (to be examined in chapter six), of enforcement of the resulting judgment. Subsection 258(1) permits the insurer to be directly sued in Ontario in respect of a judgment obtained against the insured in any province or territory of Canada.

Clause 252(1)(b) is at least a partial legislative reversal of the first rule in *Phillips v. Eyre*, the rule requiring actionability by the law of the forum. It has always struck us as ironic that a case that has been legislatively rejected in what has to be regarded as an important aspect of its holding nevertheless remains a "leading case" with its authority unimpaired.

Other provinces have similar legislation. See, e.g., *Insurance (Motor Vehicle) Act* R.S.B.C. 1979, c. 204, s. 17, *The Automobile Insurance Act*, R.S.S. 1978, c. A-35, s. 50, and *Insurance Act*, R.S.N.S. 1989, c. 231, s. 126. The British Columbia and Saskatchewan provisions relate to government run schemes of automobile insurance, but they too have to conform to the needs for both uniformity and effectiveness if interprovincial mobility of highway traffic is not to be significantly restricted.

Part B – Accident Benefits, Section 2.43 of the standard Ontario Automobile Insurance Policy (O.P.F. 1) provides that, in respect of an accident in Québec (and if certain conditions are met) that:

2.44 The insurer will pay with respect to a person insured in Québec [defined in section 2.43] who dies or sustains physical, psychological or mental injury as a result of an accident in Québec or who incurs a cost described in section 2.4, as the person may elect,

(a) benefits as provided [under the Policy]; or

(b) benefits in the same amounts and subject to the same conditions as if the person was a resident of Québec as defined in the *Automobile Insurance Act* (Québec). . . .

Part D – Uninsured Automobile Coverage, Section 4.1 [giving effect to s. 265 of the *Insurance Act*] provides for coverage where the injury is caused by an uninsured or unidentified motorist. This coverage is limited to the minimum

amounts required in the jurisdiction where the accident occurs. This provision suggests a limit on the application of the second rule in *Phillips v. Eyre* and, perhaps, that what occurred in *Chaplin v. Boys* is inconsistent with it. Note that if the injured person is a passenger in the insured vehicle, the coverage under this Part is unnecessary.

S.E.F. 44, Family Protection Endorsement, extends coverage, to the limits purchased by the insured, in respect of injuries suffered by him or her or his or her dependants that are not fully compensated under any coverage obtained or available from the negligent driver. The amount recoverable is reduced by the amounts that could be obtained (whether they are sought or not) from, for example, the Régie d'assurance automobile du Québec. What is interesting about this coverage is that is a contractual extension of coverage to the insured and his or her dependants. It does not provide and coverage to third parties. As contractual coverage, its scope is determined by the terms of the Ontario policy and the endorsement.

The large problem that we are left with is where we go from here. The combination of *Chaplin v. Boys* and *Grimes v. Cloutier* would suggest that the traditional rules of *Phillips v. Eyre* no longer are accepted as the law in Canada. *Grimes v. Cloutier* is, we believe, consistent with a radical re-casting of the law, but that view of the decision would not be consistent with that of the Court—Morden J.A., did not see the decision as any more radical than Griffiths J.A., did. The British Columbia Court of Appeal in *Tolofson v. Tolofson* certainly did not see the decision as in any way radical. The fundamental problem is that once one begins to tinker with the traditional rules of conflicts, it is impossible to stop or to find any reason for doing any particular thing with them. Since they are, by their very structure, irrational and blind to the purposes that they achieve, they *cannot* be made to work in a purposeful way.

The tinkering that the House of Lords did in *Chaplin v. Boys* was naive and silly. No rule emerged from that exercise and all that it accomplished was the opening of Pandora's Box. "Flexibility" without principle or guidance is anarchy. Once that initial step had been taken, there was, literally, no going back. Few judges were going to use the old rules to justify results that they found wrong. Each manipulation brought its own difficulties.

The only long term solution lies in the radical approach that Morden J.A., perhaps without meaning to do so, articulated in *Grimes v. Cloutier*. That approach involves the replacement of all choice of law rules by rules that are

(i) based on ordinary tort ideas of the forum—how that jurisdiction

balances the claims of those who are victims of the activities of society against those who carry out activities of which our society, in general, approves, and

(ii) either frankly constitutional—officious intermeddling must entail a violation of s. 92(13)—or a reflection of such rules and, where the matter extends beyond the borders of Canada, of the rules of international law.

Chapter 4

Escape Devices

INTRODUCTION

We have seen that the whole structure of the traditional choice of law process depends on the initial characterization of the question or matter before the court. It would take little imagination to realize that the courts have manipulated the characterization of the question to justify the result that the court wanted, for reasons which it did not care to state, to reach. Such manipulation is no more unexpected than the kind of manipulation that courts make of consideration or cause in tort. In fact, the more black-letter a rule appears or the more rigid the "correct" application of the rule is thought to be, the more likely the court is to manipulate the rule, for the rule has no apparent elasticity or "leeway" to permit the court to weigh openly the competing merits of the parties' claims.

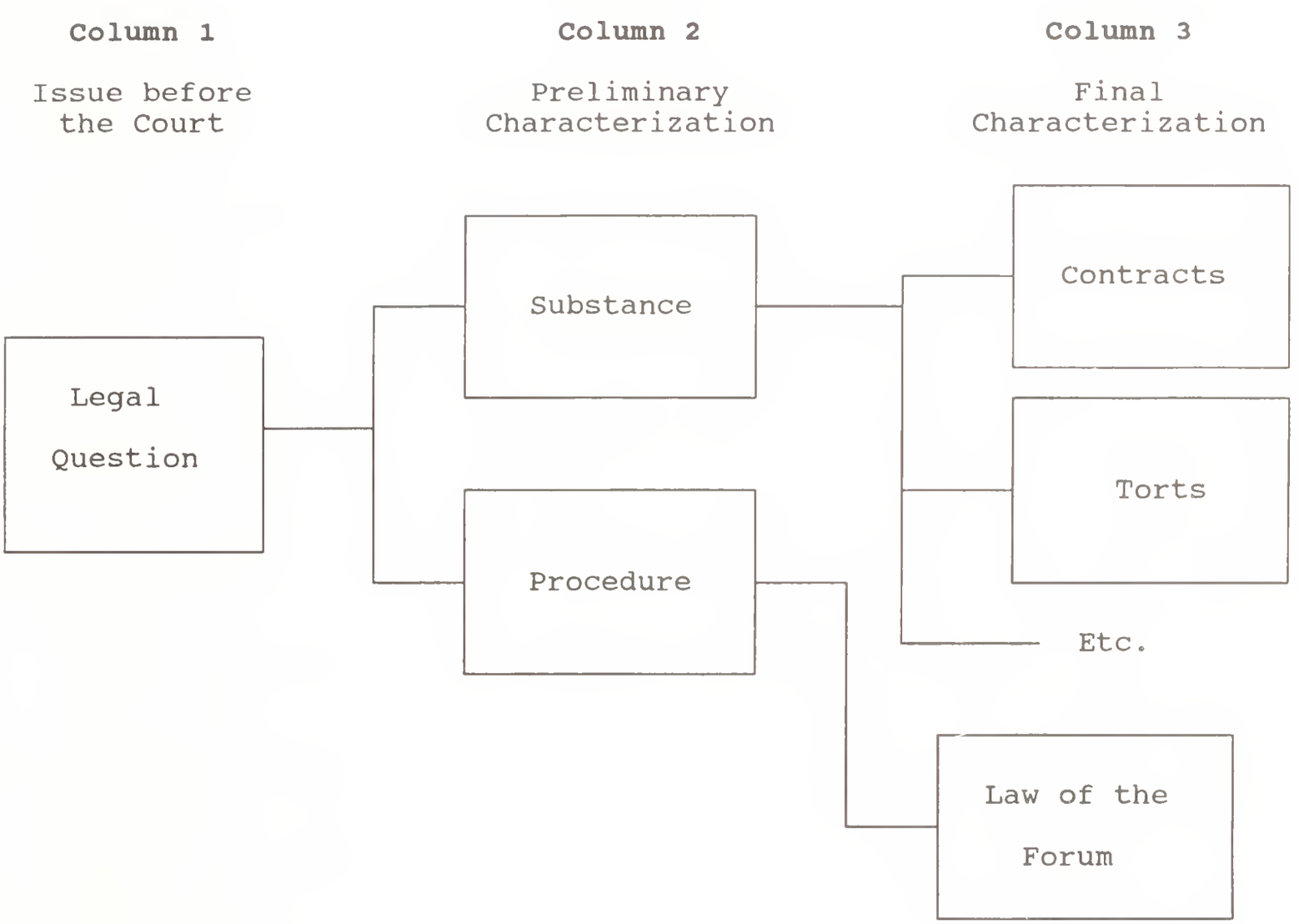
There are three principal methods that the court can use to reach the result that it feels should be reached. The first of these methods is the distinction between substance and procedure, the second is the doctrine of renvoi, and the third is the open choice of competing characterizations. In the section of this Chapter that follows we shall briefly explore the devices that are open to the court.

THE SUBSTANCE/PROCEDURE DISTINCTION

In the Introduction to these Materials we discussed the process of characterization. A dispute which initially looked like a torts case might, on occasion, be characterized as a contracts case or a family case in order to bring into effect a different choice of law rule and change the outcome of the dispute. Such "recharacterizations" are not common. In general a dispute is so obviously a "contracts case" or a "torts case" that the prospects of re-categorizing it as something else are slim. There is, however, one aspect of the characterization process which frequently comes into play: the substance/procedure distinction.

No matter what law is selected by the choice of law process, no Canadian court will ever apply a foreign law which it views as procedural (as opposed to substantive). In addition, even when some foreign substantive law is found to apply, a Canadian court will not view that foreign law as displacing any forum law which is characterized as procedural. In other words, the procedural rules of the *lex fori* will apply, even if they have the effect of contradicting or reversing the applicable foreign substantive law. Table 1, *supra*, p. ?, can now be revised to include this preliminary question:

Table 2



It is easy to see why the problem of characterization is a common one. Indeed, whether or not it is expressly adverted to, the substance/procedure distinction must be made in every case in which some foreign law is found to apply. For example, if, as in *Etler v. Kertesz*, (*supra*, p. ?) an Ontario court decides to apply the contract law of Austria, that cannot have the effect of saying that the Ontario court must behave exactly as an Austrian court would if the Austrian court were trying the case. If the Ontario court had to imitate an Austrian court in every respect it would have to use Austrian rules for launching a claim; Austrian rules for the respective roles of judge and counsel; it would have to use Austrian rules of evidence and pleading; it would have to conduct the proceedings in the German language, and so on. Obviously this is not what the choice of law process requires.

The Ontario court will use its own procedure and simply import the substantive law chosen by the choice of law rule. Presumably the procedural differences

between Austria and Ontario, such as whether the plaintiff sits on the right side or the left side of the courtroom, have no real impact on the outcome of the litigation. In addition, it would be difficult and time-consuming to import and apply such things as Austrian evidence law. We can assume that, like the matter of which side of the court you sit on, the differences between the Austrian and Ontario rules of evidence are, in the final analysis, inconsequential. Both Austrian and Ontario rules, though they may be as different as left and right, have the purpose of presenting to the trier of fact the data relevant to the decision to be made.

It should be noted that, to the extent we characterize legal rules as procedural, we risk negating the choice of law process. If we decide that the law of some foreign jurisdiction governs a dispute (we can call this the *lex causae*), and then turn around and categorize the issue governed by that law as procedural, we might just have well not have chosen to apply the court's domestic law in the first place. Similarly, if we are going to call all forum laws procedural, with the consequence that they override the *lex causae*, we will have rendered the choice of law process useless. Although it seems necessary to classify or to characterize certain rules as procedural it will be important to confine the limits of this classification to ensure it does not intrude into the merits of the dispute.

It is not clear that the traditional method of making the distinction has been particularly useful in limiting the range of what will be characterized as procedural. For example, in *Huber v. Steiner* (1835), 2 Bing. N.C. 202, 132 E.R. 80 (C.P.), Tindal C.J. characterized England's *Statute of Limitations* as procedural. Thus, although the action was on a promissory note made abroad, and both the plaintiff and defendant were domiciled in France, the longer English limitation period permitted the action to be brought in England which would have been time-barred in France. An example of this in Canada is *Benedict v. Antuofermo* (1975), 60 D.L.R. (3d) 469 (N.S.S.C., T.D.), where the Nova Scotia court entertained an action arising out of an Ontario traffic accident, even though the action would have been time-barred by the limitation period in Ontario's *Highway Traffic Act*. Conversely the same rule can also operate to bar an action where the forum's limitation period is the shorter one, even though the limitation period of the place where the accident occurred is still running: *Allard v. Charbonneau*, [1953] O.W.N. 381, [1953] 2 D.L.R. 442 (Ont. C.A.).

Sometimes these cases are justified by the reasoning that limitations statutes do not, by their express terms, destroy a cause of action, but only limit the time in which a court may entertain that cause of action. That is, limitations statutes often use words such as "no action may be brought . . .", and such words seem procedural. This same reasoning is often used to find that writing requirements, such as those found in the *Statute of Frauds*, are procedural. Such requirements

are said to take away the remedy but not to destroy the right. Does it seem likely that the drafters of *Statutes of Limitations* or the *Statute of Frauds* had in mind these consequences for the choice of law process?

In the following two cases foreign substantive law is found to govern the contract in question. We see the defendant trying to escape liability by availing itself of some rule of forum law which might be characterized as procedural.

Toronto-Dominion Bank et al. v. Martin Estate
[1985] 4 W.W.R. 557, 39 Sask. R. 60
(Sask. Q.B., Walker J.)

WALKER J.: This is an application pursuant to Q.B.R. 99 for an order (1) declaring this action to be a nullity on the ground that leave has not been granted to the plaintiffs pursuant to ss. 2 and 3 of the *Land Contracts (Actions) Act*, R.S.S. 1978, c. L-3, and (2) dismissing the action on the ground that it infringes s. 2 of the *Limitation of Civil Rights Act*, R.S.S. 1978, C. L-16.

There is an agreed statement of facts as follows:

> 1. No leave has been granted to commence the within action pursuant to the provisions of the *Land Contracts (Actions) Act*.
>
> 2. That the mortgage referred to in paragraph 5 of the plaintiffs' claim was granted by the defendant, Bertha Margaret Martin and her deceased husband, John William Martin, of whose estate she is the Executrix, to the plaintiffs, Wayne Kirby Wills and Linda Kay Wills to secure to Wayne Kirby Wills and Linda Kay Wills a part of the purchase price of the land and premises described in paragraph 5 of the plaintiffs' claim which was concurrently with granting of the aforesaid mortgage sold by Wayne Kirby Wills and Linda Kay Wills to John William Martin and Bertha Margaret Martin.

I am to be concerned with both the agreed and alleged facts. The land referred to in paragraph 5 of the statement of claim is in British Columbia, where, at all material times, until about January 3, 1984, the defendant and her now deceased husband resided. The contract was made in British Columbia. The parties were there. The land was there. This jurisdiction entered the picture only when the defendants moved here and were sued here.

It is agreed that the applicable procedural law is that of the *lex fori* Saskatchewan. It is also agreed that the proper law of the contract is that of the *lex causae* British Columbia. I have before me no indication of the relevant British Columbia law. It is, however, not necessary to "leap the stile" before coming to it. I have a circumscribed question before me at this point.

A Canadian court always applies its own procedural rules even though the merits are governed by some foreign law. The over-simplification which prevails in

duly licensed. . . in a jurisdiction other that British Columbia for the recovery of any commission or other compensation, the payment of which is not prohibited by section 30" (s-s. 37(2)).

The fact that the *Real Estate Act* is legislation in the public interest does not require a Court to declare that every contract for the payment of a real estate commission is unenforceable in British Columbia merely because the plaintiff is not licensed under the British Columbia Act.

In this case, had an agent duly licensed in British Columbia entered into that contract with the plaintiff in Alberta the plaintiff could have brought an action in British Columbia for commission without being faced with any defence based on s-s. 37(1) or without being faced with the defence that the action was unenforceable in British Columbia because of public policy. Does public policy in British Columbia require that we bar this action in British Columbia merely because the owner rather than his agent in British Columbia entered into the contract with the plaintiff? In my opinion the answer is an unequivocal "no". I think that we should bar an action on the grounds of public policy only if we could say it was contrary to "essential public or moral interest" or "contrary to our conceptions of essential justice and morality". We could not say either of those things in this case. In fact, if anything, the converse is true.

In the circumstances, I would dismiss the appeal.

QUESTIONS AND NOTES

1. After reading this judgment list the factors that are relevant in supporting the conclusion that the plaintiff is entitled to its commission. In particular, what factors induced the court to consider that the act did not involve a matter of procedure?

(a) To what extent is the distinction between substance and procedure a matter of the form in which the act is drafted?

(b) To what extent is the distinction capable of being reduced to some kind of predictable process?

(c) The distinction between substance and procedure can become blurred. For example, what law *should* govern the limitation period, the burden of proof or the parol evidence rule? (We know that the limitation period is often treated as a matter of procedure because most such statutes are worded as "barring" the action and not as "destroying" the right. Is such an analysis or justification convincing?) What is the purpose of a limitation period? Similarly, what are the purposes of the other two rules?

2. In *R. v. Sutcliffe Agencies Ltd.* (1980), 17 R.P.R. 245 (Man. C.A.), a real estate agent, who was licensed in Ontario, and who had a listing of land in Ontario, was approached by a Manitoba resident who wanted to purchase the land. The agent took the agreement of purchase and sale to Winnipeg where the purchaser signed the agreement. The agent was prosecuted in Manitoba for acting as a real estate agent without a Manitoba licence. What the agent did was held to be a violation of the *Real Estate Brokers Act*, R.S.M. 1970, c. R. 20, and a conviction of the agent for "negotiating" a sale in Manitoba without being licensed to do so was upheld.

Which would you think was worse, what the defendant did in *Sutcliffe Agencies Ltd.*, or what the plaintiff did in *Block Bros. Realty*?

3. Notice that the B.C. legislation contains s. 37(2). What would have happened in *Ross v. McMullen* had Alberta had the equivalent section at the time that the case was decided?

4. The large issue raised in the notes, *supra*, pp. ?, ff, just preceding the extract from *Ross v. McMullen*, can now be reconsidered with *Block Bros v. Mollard* as a specific case for the focus for our analysis:

(a) In the light of the court's analysis of the enforceability of the contract in British Columbia, what inferences can one draw about the purpose seen by the court for the act, and in particular, for the prohibition on claims by unlicensed agents?

(b) Suppose that you are appearing before a British Columbia court on behalf of an unlicensed agent who had acted for a vendor and was now suing for her commission. Suppose that there are no foreign facts. How could you use the judgment of the Court of Appeal in your argument? Could it be seriously argued that the claim is one that should attract all the consequences of illegality? In view of the final paragraph of the extract from the judgment of Craig J.A., can the failure of the person suing for a commission be really seen as justifying the conclusion that "*ex turpi causa non oritur actio*"? What then does the judgment do to the whole concept of illegality in contracts?

(c) Can the judgment of the court be used to base an argument that in a case similar to *Sutcliffe*, no offence has been committed? What would have happened if the plaintiff in *Block Bros. v. Mollard* had already been convicted for the offense of acting as an agent without a licence?

(d) If the enforceability of contracts to pay a real estate agent a commission is determined by ordinary choice of law principles, what content do we now give to the limitation on the parties' freedom to choose whatever law and for whatever purpose that was articulated by Lord Wright in *Vita Foods*?

5. In the case of *Block Bros. Realty Ltd. v. Mollard*, the defendant also attempted to evade its liability under the Alberta contract by claiming that the relevant provisions in the B.C. *Real Estate Act* were procedural. The court rejected the defendant's argument, holding that legislation should be characterized as procedural only if the question is beyond any doubt. Seaton J.A. was on the bench in both *Granoff* and *Block Bros.* How could he concur in both decisions?

6. One matter which is normally thought to fall within the realm of procedure is that of who may (or should) be a party to a legal action. In *Regas Ltd. v. Plotkins*, [1961] S.C.R. 566, 26 D.L.R. (2d) 282 the issue concerned the right of an assignee of a chose in action to sue in his own name. At common law the assignee of a debt could not sue in its own name. This fact led to the intervention of equity and the eventual development of statutory rules permitting assignees to sue in their own names in certain circumstances (See, *e.g.*, *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, s. 53, *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 32, and *Judicature Act*, R.S.N.S. 1989, c. 240, s.43 (5).) The right of an assignee was, however, subject to three important qualifications: (1) the assignment must be absolute, *i.e.*, not given merely as security; (2) the assignment must have been of the whole debt; and (3) the assignee must have given notice to the debtor. These limitations are important for the protection of the debtor who is entitled to have all the parties who might have a claim against it bound by a single judgment, so that it is not subject to multiple actions. The debtor is also entitled to know to whom it is liable.

The debt sued on in *Regas* had arisen in Saskatchewan. The assignment that was relied on by the plaintiff had been made in Alberta. By Saskatchewan law (now the *Choses in Action Act*, S.S. cap. C-11, s. 2) the assignee could sue in his own name. By Alberta law (*The Judicature Act*, R.S.A. 1955, c. 164, s. 34(15)) an assignee could not. Plotkins had sued in Saskatchewan and the defendant argued that, since the proper law of the *assignment* was Alberta, the question of whether Plotkins could sue in his own name was governed by Alberta law. The Supreme Court unanimously rejected this argument, holding that the right of an assignee to sue in his own name is a matter of procedure governed by the *lex fori*.

7. Is the question this simple? Suppose that the facts were reversed and the debt had arisen in Alberta. What arguments could you make on behalf

of the defendant?

Another matter sometimes characterized as a question of procedure is the law of remedies. It is said that the forum should always apply its own remedial law. This issue was raised in *Chaplin v. Boys*, (p. ?, *supra*). Lord Wilberforce discusses this rule at the end of his judgment (p. ?, *supra*).

In *Livesley v. E. Clemens Horst Co.*, [1924] S.C.R. 605 the Supreme Court limited the scope of the rule. In that case, the plaintiff was an unpaid seller under a sale of goods contract, the proper law of which was California. Californian law gave the unpaid seller a lien on the goods and the right to sell them and claim for the difference between the proceeds of sale and the contract price. An action was brought in British Columbia, where sellers had a more restricted right. In rejecting the appellant purchaser's argument that the remedial rules of the forum should apply, Duff J. wrote:

> In principle, it is difficult to discover a solid ground for refusing to classify the right to damages for breach of contract with other rights arising under the proper law of the contract, and recognizable and enforceable as such. . . . The exception embraces a very wide field, and among other things excludes procedure, because the policy of the English law recognizes no vested rights in procedure, and a party invoking the jurisdiction of the courts must take procedure as he finds it. The concept of procedure, too, is, in this connection, a comprehensive one, including process and evidence, methods of execution, rules of limitation affecting the remedy and the course of the court with regard to the kind of relief that can be granted to a suitor. But it does not, of course, extend to substantive rights; and here questions as to substantive rights include all questions as to the "nature and extent of the obligation" under the foreign contract. *Fergusson v. Fyffe* [[1840] 8 Cl. & F. 121, at 140, 8 E.R. 49, at 56] per Cottenham L.C.

It is most important to observe that it is not the foreign agreement to which effect is given by English law but, as the language of the accurate judge, whose judgment is quoted, suggests, it is the civil or legal right generated by the contract. The right of action, as Willes J. said in *Phillips v. Eyre* [[1870] L.R. 6 Q.B. 1, at p. 28], is a "creature" of the law by which the contract is governed. Applying the principle to circumstances of the case before us, the lien given to the vendor, and the accessory right of sale, are obviously substantive rights given by the law of California to the vendor as such; in his capacity, that is to say, as seller under a contract of sale. And the right to recover the difference between the contract price and the moneys realized on the sale would seem to be not less so.

The result of the case is that sometimes remedial issues will be viewed as

substantive and sometimes procedural, though the Supreme Court's use of the vested rights principle as the test for deciding the question may not help us in predicting what will happen in future cases, that particular test having been rejected some years after the decision of the Supreme Court of Canada.

Would you feel confident in saying that, when the remedial law of the *lex causae* is significantly different from that of the forum and is also easy to apply, then the remedial law of the *lex causae* will be found to be substantive?

J.D'Almeida Araujo v. Sir Frederick Becker & Co. Ltd.
[1953] 2 Q.B. 329, [1953] 2 All E.R. 288
(Q.B.D., Pilcher J.)

[The facts were stated in the headnote: — The defendants, an English company, agreed to buy five hundred tons of palm oil from the plaintiffs, a Portuguese company. Payment was to be made by the defendants opening a credit in escudos in Lisbon in favour of the plaintiffs. To fulfil their contract with the defendants, the plaintiffs bought the palm oil in Lisbon from M., it being agreed that payment was to be made by the plaintiffs opening a credit in Lisbon in escudos in favour of M., and, if either party should fail to fulfil the contract, that party should pay to the other party, as indemnity for the damage, an amount corresponding to five per cent. of the total value of the contract. The defendants failed to open the necessary credit in Lisbon as a result of which the plaintiffs did not open the credit in favour of M., and were compelled to pay him £3,500 as indemnity. It was agreed that the contract between the plaintiffs and the defendants was governed by the *lex loci contractus*, Portuguese law. The plaintiffs claimed to recover the £3,500 from the defendants.

[PILCHER J. stated the facts, found that a concluded contract was arrived at between the plaintiffs and the defendants, one of the terms of which was that credit should be opened by the defendants in favour of the plaintiffs as soon as was reasonably possible in the ordinary course of business, that under Portuguese law the plaintiffs were contractually bound to pay, and did pay, to Mourao the sum of £3,500, and that the defendants were in breach of their contract to open the credit provided for by the contract within a reasonable time, and continued:]

While it was common ground between the parties that the substantive contract between them was governed by Portuguese law, the plaintiffs contended that the damages which they were entitled to recover in the particular circumstances of the case were also to be determined in accordance with the principles of Portuguese law. The defendants, on the contrary, submitted that, even where the substantive contract is governed by foreign law, procedural or remedial questions, which include the question of damages, ought to be determined according to the *lex fori*, in this case the law of England. Subject to the question of the obligation of an innocent party to mitigate the damages, to which I will refer in a moment, the question of the proper law to be applied in regard to the damages has importance, because the plaintiffs are seeking to recover from the defendants the £3,500 as one head of damage, that being the sum they

QUESTIONS AND NOTES

1. What question does the conventional inquiry into the measure of damages try to answer?

2. What question does the conventional inquiry into "remoteness" of damage try to answer? Put into other words, what is the effect of the decision in *Hadley v. Baxendale*?

3. Are Pilcher J. or the authors that he quotes correct in their analysis of the law of damages?

4. What difference should the answers to these questions make in the law to govern the issue before the court?

5. If the goal of the choice of law process is uniformity to what extent can that process be expected to achieve that goal if the English analysis is dependent on distinctions based on the idiosyncrasies of the common law?

6. If you examine the traditional English textbook available in 1953, the discussion of the law of damages will be divided into two parts. The first part will be a general statement of the goal of compensation discussed in about a page or two. The balance of the discussion will be on *Hadley v. Baxendale* and on the issue of remoteness. It is worth spending a moment to note some things about that focus.

(a) The issue in *Hadley v. Baxendale* is usually put as one of "foreseeability" as a factual matter. You will remember that the judgment of the House of Lords in *Koufos v. C. Czarnikow Ltd. (The "Heron II")*, [1969] 1 A.C. 350, [1967] 3 All E.R. 686, focuses on whether the fall in the price of sugar in Basra was or was "not unlikely" as a factual matter, and that this inquiry determined the result of the case.

(b) If the issue of "remoteness" is cut loose from the debris of the cases and traditional commentary, the issue cannot be one of fact. It is perfectly clear from the judgment of Alderson, B. in the case itself, that whether the defendant was or was not informed of the likelihood of the loss is irrelevant to the damages to which the defendant is exposed. Alderson, B. says:

> For, had the special circumstances been known, the parties might have specially provided for the breach of contract by

> special terms as to the damages in that case; *and of this advantage it would be very unjust to deprive them.*

(c) In other words, communication is by itself irrelevant unless the defendant expressly accepts the risk of loss arising from the special circumstances communicated, and presumably, does so for an additional payment. *Hadley v. Baxendale* has *nothing to do with the facts that might or might not be "foreseeable" and everything to do with the risk of loss accepted by the defendant*. The problem is, so to speak, the converse of that which exists where there is an exemption clause in a contract. An exemption clause allocates a risk of loss to one party from the other party who would, absent the clause, bear the risk. The party who accepts the risk of loss arising from "special circumstances" assumes a risk, which were it not for the assumption of liability, would be on the other party.

7. The result of this analysis of the law of damages and "remoteness" in particular is that the question before the court is the basic question in any contracts case, *viz.*, on which party is the risk of loss? This question is usually one that the parties are free to determine for themselves so that a statement of the background against which they contracted might suggest what their agreement was. There may, as there is in Canada, be problems with the actual quantification of the amount of damages for the *Currency Act*, R. S. C. 1985, c. C-52, s. 12, provides that Canadian courts may only give judgments in Canadian dollars. The risk that this creates may be mitigated by the courts' freedom to choose the date for conversion. This legislated inability—there is nothing in principle wrong with an order of specific performance requiring performance in, say, U.S. dollars—has nothing to do with any conflicts issues; it is simply the result of suing in Canada (though two provinces have legislation which may permit courts to finesse the problem: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 121 and *Foreign Money Claims Act*, S.B.C. 1990, c. 18).

In 1984 the British Parliament passed legislation providing that restrictions on the time within which actions are to be brought shall be regarded as substantive for the purposes of conflict of laws: see the *Foreign Limitation Periods Act, 1984.* Canadian law has no equivalent legislation, though some provincial limitations acts contain "tolling" provisions. These provide that, if a person against whom a cause of action arose is outside the province, the person entitled to the cause of action may bring it within the limitation period, calculating that by deducting the time that the person was out of the province, so that the period begins to run after the return of the absent person. (For example, see *Limitations Act*, R.S.O. 1990, c. L.15, s. 48, and the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, s.

5(1).) In other words, the limitation period does not begin to run until the absent person returns. It is generally conceded that such provisions only apply when the absent person is ordinarily resident in the province. Also relevant is s. 38(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7:

> Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in such province . . . .

The effect of this is that, regardless of where the Federal Court is sitting it must apply the limitation period of the province *where the cause of action arose*. This provision avoids the potential problems posed by the substance/procedure distinction, but it may present difficulties of its own.

Is the province in which the cause of action arose necessarily the jurisdiction whose substantive law will be selected by the relevant choice of law rule?

The issue dealt with by the *Federal Court Act*, *supra*, arises more generally. We shall later have to deal with the relevance of provincial law in actions in the Federal Court. For the moment consider the case of *Miida Electronics, Inc. v Mitsui O.S.K. Lines Ltd.*, *ITO–International Terminal Operators Ltd. v. Miida Electronics*, [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641. In this case the Supreme Court of Canada stated that there was a "federal law of contract" applicable to actions arising in the Federal Court under its admiralty jurisdiction. This federal law is neither the same as the provincial law as found in the common law provinces—third party beneficiary contracts are enforceable under the federal law, but not under provincial law—nor that law of contract found in Québec. The *Miida Electronics* case concerned the allocation of the risk of loss arising from the disappearance of electronic equipment stored in the Port of Montreal.

RENVOI

The kinds of questions with which we have been concerned so far have taken the validity of the choice of law process illustrated in the cases very much for granted. We have not considered whether it might be seriously or fundamentally flawed. Nothing as important as the process outlined in the preceding cases can be taken for granted. To begin a more radical assessment of the process we can usefully ask two questions that arise out of *Bondholders Securities Corp v. Manville*, p. ?, *supra*—the case of the action against the Saskatchewan woman brought by the holder in due course of a note given to a bankrupt Florida real estate agent:

(i) Was any purpose served by applying the foreign, Florida, law? That is, were any policies, conceived by Florida law or by Saskatchewan law as relevant to an action on a contract, advanced by the decision?

(ii) Was there a good reason to depart from domestic legal policy regarding contracts, *viz*, that in the absence of strong reasons to the contrary, bargains are enforced?

The problems of married women's contracts are now no longer with us, everyone being equally free to put herself or himself into the lion's jaws and to hope, sometimes against all the evidence to the contrary, that the lion will be a merciful lion. (See Llewellyn, *The Common Law Tradition*. (New York: Little, Brown and Company, 1960) pp. 362, 363.) For a discussion of married women's contracts in conflicts cases, see B. Currie, *Selected Essays on the Conflicts of Laws* (Durham, N.C.; Duke U.P., 1963) pp. 77-127.

Bondholders may be used to illustrate another fundamental conflicts issue. Once the process of characterization has determined the legal category into which the case falls, and the appropriate choice of law rule and connecting factor has been applied, we end up with a governing law. This process has underlain all the cases we have so far examined. A further question can now be raised: If we decide to apply foreign law, how much of the foreign law are we to apply? Does the reference to foreign law, for example, include a reference to its conflicts rules? Our choice of law rule in *Bondholders* results in the application of Florida law. Should we now investigate what law a Florida court would apply to a similar case of geographically complex facts before it? Suppose that Florida law (or the Florida courts) would refer the question of the capacity of a married woman to contracts to the law of her domicile. The Florida court assumed that Mrs. Manville was domiciled in Saskatchewan. (Remember that *Dicey & Morris* refers in Rule 182 (p. ?, *supra*) to a person's domicile (as an alternative reference) for purpose of determining that person's capacity to contract.)

If we take notice of Florida's choice of law rule and accept that the issue of the defendant's capacity is now to be governed by Saskatchewan law, we could use the metaphor that the Saskatchewan court's original choice of Florida law, *including its choice of law rules*, has resulted in a "return" of the governing law to that of Saskatchewan. This process of making reference to the conflicts rules of the foreign law to which our original choice of law decision pointed us, is known as the "Doctrine of Renvoi". "Renvoi" literally means "return", and the tennis analogy would be appropriate to describe the process: the Saskatchewan court serves and the ball lands in the Florida court. (We make no apologies for the pun.) That court returns the ball to Saskatchewan. The question now is what happens next. Does the game continue in an endless rally or does one side

simply stop the game? If one court stops the game, on what ground does it do so?

The game will be stopped by one court's deciding to apply either the Saskatchewan law of contracts or Florida law of contracts, exclusive of its conflicts rules. On the facts of *Bondholders*, if the Saskatchewan court "accepted" the renvoi from the Florida court, it would uphold the contract, if the Saskatchewan court returns the ball to the Florida court, (i.e., does not accept the renvoi), it would apply Florida law. (Some cases discuss the question whether the Florida court would accept the renvoi from Saskatchewan; if it would not, then the Saskatchewan court (sadly, and with a sense that a promising rally has been aborted) would apply Saskatchewan law.

We shall examine from time to time in the course both the intricacies of the doctrine of renvoi and those areas of the law where it is conventionally accepted that the doctrine will be applied. The importance of the doctrine lies in the fact that, like the issue of the substance/procedure distinction and characterization, it is an inescapable consequence of the choice of law process we have been examining.

It is generally said that renvoi will not be used in contracts cases. For example, Morris and Cheshire, "The Proper Law of a Contract" (1940), 56 *L.Q.R.* 320, criticise Lord Wright in *Vita Foods* where, after determining that the proper law was English, Lord Wright said that "English rules relating to the conflict of laws must be applied . . ." (p. ?, *supra*) as introducing the doctrine of renvoi into contracts cases. This result would follow from what Lord Wright said because the court would first choose English law and then include in its reference to English law, English conflicts rules.

The argument that renvoi does not apply, or is not to be applied in cases characterized as contracts cases is admitted to be a practical exception to the general inevitability of renvoi. The concession that renvoi is inevitable, or is logically entailed by the structure of traditional conflicts rules is of fundamental importance to our ability to accept the traditional choice of law process as a satisfactory solution that we are supposed to deal with.

There are two illogical consequences of the doctrine. One is the argument of Morris and Cheshire (*supra*) and now expressed in *Dicey & Morris*, p. 82, that the doctrine is of only limited application. Morris and Cheshire do not argue that renvoi is not logically entailed, only that its application in every case would be too complex. The question that remains is whether one can maintain such a position without, so to speak, throwing out the baby with the bath-water. Either the doctrine is everywhere justifiable or nowhere justifiable. One simply cannot

pick and choose for no good (i.e., principled) reason.

The second problem is that at the same time as the doctrine of renvoi is logically entailed or necessary, it is equally logically insoluble. Either there is an endless oscillation or one side, so to speak, stops the rally, picks up the ball and goes home with it. Why the rally stops at any point is the great mystery. There are two theories: single or partial renvoi—once over the net and once back when the ball stops (this is the civilian method), or total renvoi—three times over the net when the ball stops. This is all known as the "English" doctrine and is, of course, more sporting than the civilian method. The problem of renvoi is made even more awkward by the fact that uniformity of results (indeed any result at all) can only be achieved if both courts do NOT adopt the same rule. If both courts adopt the same rule, then either no solution is possible (there is an endless rally) or different solutions will be reached. Thus *Dicey & Morris* state: (page 88)

> *Circulus inextricabilis*. — As we have seen, the effect of applying the doctrine of total renvoi is to make the decision turn on whether the foreign court rejects the renvoi doctrine or adopts a theory of single or partial renvoi. But if the foreign court also adopts the doctrine of total renvoi, then logically no solution is possible at all unless either the English or the foreign court abandons its theory, for otherwise a perpetual *circulus inextricabilis* would be constituted. So far, this difficulty has not yet arisen, because English courts have not yet had occasion to apply their renvoi doctrine to the law of a country which adopts the same doctrine. It is perhaps unlikely that any foreign country will adopt different conflict rules from, but the same renvoi doctrine as, those prevailing in England. Consequently, this difficulty (unlike the first two which have been mentioned) is more academic than practical. Yet the possibility remains, and the *circulus inextricabilis* cannot (it is submitted) be dismissed as "a (perhaps amusing) quibble." "With all respect to what Maugham J. said in *Re Askew*," [[1930] 2 Ch. 259] said the Private International Law Committee, [First Report (1954) Curd. 9068, para. 23(3)] "the English judges and the foreign judges would then continue to bow to each other like the officers at Fontenoy." It is hardly an argument for the doctrine of total renvoi that it is workable only if the other country rejects it.

We shall claim that traditional conflicts doctrine is fundamentally incapable of meeting its own goals by its acceptance of the doctrine of renvoi. To argue that it is too complicated to apply the doctrine in contracts cases is not an adequate answer to the question of the doctrine's scope, unless a reasoned justification can be found for arguing that contracts cases require simpler rules than, say, marriage cases where it is accepted that renvoi may be applied. Carried to its conclusion the argument for simplicity would suggest that contracts cases be decided by flipping a coin. If we reject this method as undercutting the demand for rational and reasoned decision making, how can we pick an arbitrary point at which to stop our investigation of the rules we have determined are relevant, that is, to stop the potentially endless oscillations of renvoi?

> apply, not to the propositus, but to its own nationals legally domiciled there? In other words, when we say that French law applies to the administration of the personal estate of an Englishman who dies domiciled in France, we mean that French municipal law which France applies in the case of Frenchmen. This appears to me a simple and rational solution which avoids altogether that endless oscillation which otherwise would result from the law of the country of nationality invoking the law of the country of domicil, while the law of the country of domicil in turn invokes the law of the country of nationality, and I am glad to find that this simple solution has in fact been adopted by the Surrogates' Court of New York.

NOTES AND QUESTIONS

1. *Cheshire & North* state: p. 72

> . . . the renvoi doctrine cannot be rejected *in toto*, since it has proved to be a useful and justifiable expedient for the solution of at least certain special questions. The conclusion, in fact, is that in general a reference made by an English rule for the choice of law to a foreign legal system is to the internal law, not to the private international law, of the chosen system, but that this general principle is subject to . . . exceptions.

To return to one of our constant themes: what do you think Cheshire & North mean by "useful" or "justifiable"? Given that Cheshire & North adopts the traditional approach to Conflicts, how can anyone who adopts that approach tell what is or is not "useful"? The word "useful" connotes, at least, some standard of utility which gives it content. What content to Cheshire & North have for the word "justifiable"?

2. The exceptions where renvoi may be applicable are:

   (a) bequests (gifts of movable property, i.e., personalty, by will);

   (b) title to foreign land;

   (c) certain cases of title to movables; and

   (d) marriage.

In the first and fourth examples renvoi is usually only applied to make the bequest or marriage *valid*. It is not used to make a bequest or a marriage *invalid*. What happened in *Re Annesley*? The second and third exceptions are, perhaps, justified on the ground that a court should, if it even takes jurisdiction, adopt the "foreign court" view of choice of law. The original *Personal Property Security Act* of 1967 in Ontario (but not the one in force now, R.S.O. 1990, c. P.10) had very

curious provisions imposing a statutory renvoi.

3. What purpose of either French or English law was forwarded by the decision in *Re Annesley*? Is any justifiable reason given for the restriction of the testamentary freedom of the testatrix? In other words, if the common law has a principle, akin to that in the law of contracts, that a testamentary document will be given effect absent some good reason to the contrary, what reason is there for denying Mrs. Annesley full testamentary freedom? What reasons justify the restriction of testamentary freedom in Ontario now?

4. How would you use the statement from *Cheshire & North* in any case you were arguing?

5. There is a curious case, *Re Thom* (1987), 40 D.L.R. (4th) 184 (Man. Q.B.) which raises this issue. The widow of a man who died intestate, owning property in both Saskatchewan and Manitoba, sought to claim the widow's preferential share in both provinces. She obtained her share, $40,000, in Saskatchewan where the couple had been domiciled at the date of the man's death. Saskatchewan law would be relevant to determine the share that she would take because the relevant choice of law rule is that succession to movable property is governed by the law of the domicile of the deceased at the date of his death. The conflicts distinction equivalent to that between real and personal property in the common law is that between movable and immovable property.

She then claimed the widow's preferential share, $50,000, in Manitoba on the basis that Manitoba law applied since the Manitoba property was land, and the distribution of land is a matter for the law of the *situs*. The court rejected her claim, noting that if it were allowed, an equitable distribution of the estate would not be achieved for the children would be disadvantaged by the widow's double claim.

The court awarded the widow $10,000, the difference between the two shares. The court said that if it were to dismiss the Manitoba claim, it would be

> sitting as a court in Saskatchewan, applying the law of that province. This is what is known as the doctrine of *renvoi*. While English courts have applied the doctrine, courts in Canada have not been favourably disposed to do the same . . .

Counsel for the children had already argued that "conflict of laws principles are outmoded and should not be applied".

We shall look at this case in Volume III of these materials.

6. What do you think the position of the judge should have been on the facts of *Re Thom*? (We can ignore for now the argument of counsel for the children, though it would be interesting to know what he meant by the claim that conflicts was "outmoded".)

7. How would you plan the affairs of a testator or testatrix so as to avoid the problems created by the chance that a Canadian court might adopt the doctrine of renvoi?

8. Renvoi does not necessarily involve the question of "bouncing back" to the law of the forum. In *Vladi v. Vladi* (1987), 7 R.F.L. (3d) 337 (N.S.S.C., T.D.) (a case we shall examine in more detail in Volume III) the court found that the question of division of the parties' matrimonial assets should be decided by the law of the last common habitual residence of the parties, which was West Germany. It then found that a West German court would apply Iranian law to this case, since the parties were citizens of Iran. The court was undecided whether to accept this renvoi to Iran, but since it found the matrimonial property regime of Iran offensive on grounds of public policy (another escape device) it did not have to decide that question conclusively. Since Western German law pointed to a rule which was inapplicable on grounds of public policy (that of Iran) should the court then have applied to internal matrimonial regime of West Germany or of Nova Scotia? It chose the former (though in applying the definition of "matrimonial assets" from the Nova Scotia legislation it effectively applied a composite of the two).

CHARACTERIZATION

We know from everything that we have ever learnt in law school that "bright line" divisions between areas of law, between rules of law and between any kind of test and some other test do not exist. There may often be simple or paradigm cases, but since these are, literally, too clear for argument they are neither litigated nor studied. No one would waste money litigating them, and no one would be in any doubt as to what advice should be given to a client.

The cases that are both litigated and studied are those where there is difficulty drawing the line: Is there or is there not consideration for this promise? If there is no consideration does it matter? Is this a form of liability that attracts contract type damages or tort type damages? Is this case within that class of cases where relief can be given for mistake, or for some other disappointment.

The traditional rules assume that the process of characterization is both possible and likely to be carried out with the same result in both or all concerned jurisdictions. The process is, of course, possible in the sense that everyone could

be made to fit Procrustes' bed, but it is quite inconsistent with the general approach of the common law. If you are asked whether something is a "contracts" question or a "torts" question, you are likely to ask, "Why do you want to know?" Definitions of concepts are not usual in the common law, and are only made in a very small number of situations where very often great awkwardness is the result. The current dispute over the proper limitation period is one such example. When it matters whether the plaintiff's cause of action is characterized as a torts case or as a contracts case, the courts will very often leave the law in a state of confusion, for the choice of slot will be made in result selective way. If the court wants to lengthen the period within which the plaintiff can bring its action, the claim will be called a tort claim. It is not over-stating the current confusion to say that the courts can call almost any claim a torts claim or a contracts claim as it suits them.

Two recent examples of such developments are:

1. *Frank Elger & Co. Insurance Agency Ltd. v. Gestas Inc.* (1987), 38 D.L.R. (4th) 274, (Ontario H.C.). In this case the insurer had issued a policy on a "claims made" basis, i.e., covering any claims made during the policy period. A claim was made during the policy period, but the claim arose out of an action started against the insured before the policy coverage extended to the particular claim made. The court held that the claim came within the policy.

2. *Re Thames Steel Construction Ltd and Northern Assurance Co. Ltd.* (1987), 38 D.L.R. (4th) 312, (Ontario H.C.) In this case the insurer had issued a policy covering claims arising out of an "occurrence . . . during the policy period". A loss arose from the collapse of a roof fourteen years after it had been built by insured. The court held that the insured had an obligation to defend the claims made by the owners of the building against the insured. In other words, the claim was held to have arisen out of an occurrence during the policy period.

In order for the court to have reached either of these results, the claims must have been regarded as something other than contracts claims. The effective evisceration of the old limitation period for breach of contract that has been achieved by the general collapse of the distinction between contract and tort. The best example of this fact is *Consumers Glass Co. Ltd. v. Foundation Co. of Canada Ltd./Compagnie Foundation du canada Ltée.* (1985), 51 O.R. (2d) 385, 20 D.L.R. (4th) 126, (C.A.). See also *V.K. Mason Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271, 16 D.L.R. (4th) 598, 58 N.R. 195, 35 R.P.R. 118.

The next case illustrates a court's use of characterization to avoid a rule that it did not like.

a contract depends upon the law of the place of contract, "unless the contract is to be performed or to have its beneficial operation and effect elsewhere, or it is made with reference to the law of another place." . . . We will enforce rights of action on contracts arising in other jurisdictions unless these contravene our own law, or our own fundamental and important public policy imperatively requires their nonenforcement. . . . It is a general rule, subject to the exceptions we have noted, that rights *ex contractu* may be enforced anywhere. . . .

If the liability of this defendant under this statute is contractual, no question can arise as to the plaintiff's right to enforce this contract, provided the obligation imposed upon this defendant was for the "direct, sole and exclusive benefit" of the plaintiff. The contract was made in Connecticut; at the instant of its making the statute made a part of the contract of hiring the liability of the defendant which the plaintiff seeks to enforce. The law inserted in the contract this provision. The statute did not create the liability; it imposed it in case the defendant voluntarily rented the automobile. Whether the defendant entered into this contract of hiring was his own voluntary act; if he did he must accept the condition upon which the law permitted the making of the contract. The contract was for the "direct, sole and exclusive benefit" of the plaintiff, who is alleged to have been injured through the tortious operation of the automobile rented by the defendant to Sack. The right of the plaintiff as a beneficiary of this contract to maintain this action is no longer an open question in this state. . . . The contract was made for him and every other member of the public. That the beneficiary was undisturbed because each of the public was a beneficiary is of no consequence. His injury determines his identity and right of action. . . . The assent of the beneficiary, if required, is manifested in his action upon the contract. The demurrer should have been overruled.
There is error, the judgment of the superior court is reversed, and the cause remanded to be proceeded with according to law.

The other Judges concurred.

NOTES AND QUESTIONS

1. You can see in *Levy* and *Haumschild* courts manoeuvring in the context of the American rules for choice of law in torts in 1928 and 1959. It is irrelevant for the purposes for which these cases are used here that the choice of law rules applied by the American courts are not the same as ours. You should note also that the rules for both contracts and torts are not the same as those that would now be applied by the American courts.

2. The Ontario Court of Appeal in *Charron v. Montreal Trust* (*supra* p. ?) could easily have prevented the widow's action by characterizing her claim as one of succession or matrimonial property rather than contract. If either of these characterizations had been made the choice of law rule would have indicated that the law of the husband's domicile at either the date of his death or the marriage would have applied.

3. What criteria could you, as counsel for the estate or for the defendant on the appeal in *Charron v. Montreal Trust*, have offered to the court to induce it to do so? What arguments might counsel for the widow have made? How would you use cases like *Haumschild* and *Levy*?

4. What would you infer from the arguments that you might make about the factors that would be likely to move the court one way or the other?

5. The contagion that is carried by these compromises and refusals to talk openly about what is at issue has been carried to every part of the traditional conflicts doctrine. If we can defend result-selectivity in characterization, we can defend it in determinations of the proper law of the contract. It is, therefore, regarded as permissible to choose the proper law with an eye on the result that the choice will lead to. Since the reason for the choice must be hidden—the test for the proper law of the contract refers only to the law of that jurisdiction that has the closest and most real connection with the contract—once again no reasoned argument is possible, nor are counsel given any guidance on what facts might be relevant.

6. The following statement openly endorses result-selective characterization and the use of devices like renvoi to reach desired results. Castel, *Conflict of Laws, Cases, Notes and Materials*, 6th ed. 1987, p. 1-35:

> . . . Canadian courts should not feel ashamed to use the traditional method of jurisdiction-selecting rules to solve conflict of laws cases. The centuries old process has resisted many assaults and on the whole, proved quite successful. To say that the courts choose a law without considering how that choice will affect the controversy is not accurate. The lawyer representing one side or the other in a case characterizes . . . the problem in such a way that it will, by virtue of the relevant conflict of laws rules, ultimately call for the application of a law supporting his client's contention. Obviously, he has examined the contents of the potentially applicable laws. If the court feels that it would lead to an unjust result to apply the law called for by the suggested characterization, it will reject such characterization, or use other techniques such as *renvoi*, public policy, and so on in order to apply a different law and reach a different result. As will be noted, characterization is not a purely mechanical process. If more than one characterization is available for a set of facts, the choice between the characterizations may turn upon the court's desire to achieve justice in the particular case or preference for one rule of law over another.
>
> Under the traditional approach the court is able to concern itself with the contents of the foreign laws among which it has to choose and of the policies behind them before selecting the one state whose law will be applied, even though the court does not frame its opinion in those terms. In practice, the courts do not proceed independently of the law's contents which are to be discovered at a later stage of the inquiry. Since in most jurisdictions the foreign law must be alleged in the pleadings, this gives the court an indication of the laws which will be relied upon by the parties.

It is important that you understand why we have called this section "Escape Devices". The principal claim that is made for the traditional theory is that it provides for uniform results regardless of where a case may be litigated. This claim is expressly made by Castel, *Canadian Conflict of Laws*, 2nd ed., p. 49, where he says:

> The rules of conflict of laws must be such that they will prevent the decision from depending on the fortuitous place of trial. Forum shopping must be discouraged.
>
> Predictability and uniformity of results are especially important in areas where the parties are able to give advance thought to the legal consequences of their acts. . . . Predictability gives security to the parties.

The same claim is implicitly made by *Dicey & Morris* and *Cheshire & North* in their respective discussions of the functions of Conflicts analysis.

The claim that traditional theory contributes to or ensures uniformity of results can only be maintained if the opportunities for manipulation of the rules to reach the desired results are hidden behind the screen of theory. The devices we have examined are one method by which the openly conflicting goals advocated by Castel can be simultaneously supported.

Does the following statement advance the argument that the traditional rules are effective or not? Morris, in his student text, *The Conflict of Laws*, 3rd ed. p. 9 says:

> In any given case the choice of law depends ultimately on consideration of reason, convenience and utility—e.g., how will the proposed choice of law work in practice, not only in this case, but also in similar cases in which a similar choice may reasonably be made?

How would you use this statement to argue for any desired result in any of the cases you have so far looked at?

II JURISDICTION OF PROVINCIAL COURTS, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Chapter 5

Jurisdiction of Provincial Courts

INTRODUCTION

In any judicial proceeding the defendant may argue that the court should not hear the case which the plaintiff has brought before it. The claim is that the court lacks jurisdiction to hear the case. The presence of foreign facts has an important bearing on the question whether a court should or should not take jurisdiction. The sources of the rules for taking jurisdiction (or for refusing jurisdiction) are found both in statutes and the common law. For example, the *Divorce Act, 1985*, R.S.C. 1985 (2nd Supp.) c. 3, s. 3, provides that jurisdiction to dissolve a marriage may only be taken where either the petitioner or respondent meets certain residency requirements in the province where he or she brings the petition. The common law rules, which govern matters such as claims in contract, tort and property, are more complex and we shall spend some time investigating them. The bulk of our discussions will focus on actions *in personam*. The distinction between such actions and actions *in rem* will be explained at the end of this chapter.

It is first necessary to dispose of some preliminary issues. The Canadian courts of general jurisdiction are the courts that are the lineal descendants of the original common law courts. Thus in Ontario the court of general jurisdiction is the Ontario Court. In other provinces, British Columbia and Nova Scotia, for example, it is the Supreme Court, or Trial Division of the Supreme Court of the province. In others, it is the Court of Queen's Bench. Other courts, such as the Ontario Court (Provincial Division), the former District or County Courts in Ontario, the equivalent courts of other provinces, and of course, the Court of Appeal and Supreme Court of Canada, are courts of limited jurisdiction. What the difference means is that, in general, a defendant has to show that a court of general jurisdiction should *not* hear the case if the plaintiff has brought its action there, and that the source of the rules upon which the defendant will rely is the common law (and, of course, as that law may have been amended by statute). For the other courts the plaintiff (or appellant) may either have to convince the court that it *should* hear the case (e.g. leave must be obtained to appeal to the Supreme Court of Canada) or, if challenged by the defendant, show that the statute empowering the court to hear the case properly applies. Our examination will focus almost exclusively on the jurisdiction issues raised by the existence of geographically complex facts in actions begun before provincial courts of general jurisdiction. It is a fact that the bulk of conflicts cases come before such courts.

The position of the Federal Court of Canada will not be extensively discussed in these materials, though we shall consider some special problems that its existence creates for the development of a federal approach to Conflicts and the potential impact of that on some constitutional issues

central to our analysis. That court has (or, at least, arguably should have) a special role to play in conflicts cases. Its special jurisdictional rules, however, will not be examined here. (For a discussion of the Federal Court see: Laskin and Sharpe, "Constricting Federal Court Jurisdiction: A Comment on *Fuller Construction*" (1980), 30 U.T. L.J. 283 and, for an explanation of the federal courts in American law, Bator et al. (eds.), *The Federal Courts and The Federal System* (Minneola; N.Y.: Foundation Press, 1973.)

It is very important to remember that there is a close relation between issues of jurisdiction and choice of law. We would have no need for choice of law rules if no court took jurisdiction in a case that presented geographically complex facts. Conversely, the greater the willingness of a court to hear cases with geographically complex facts, the greater the need for concern over the rule chosen as the basis for the decision. As we have seen, the existence of geographically complex facts may mean that the law of the forum should not apply. In the context of traditional choice of law rules, the kind of choice of law rule that is adopted may either encourage or discourage resort to the court of one jurisdiction rather than another. It is fairly obvious that a rule of the *Phillips v. Eyre* type may well encourage a plaintiff to seek an especially favourable forum in which to litigate her dispute. In such a case jurisdictional rules become more important, particularly if we think that a plaintiff's choice of the court in which to sue should not have any very substantial impact upon the disposition of the case.

As a simple matter of what is practically necessary, courts cannot refuse to hear cases in which the relevant facts are geographically complex. It would be unfair to deny someone like Mrs. McElroy (see, *McElroy v. McAllister*, p. 133, *supra*) a forum in which to litigate her dispute with her husband's employers—though the Scottish courts' taking of jurisdiction did not do her much good in the end. This means that we have to face the problems arising from the need to handle such cases.

The close relationship between the breadth of jurisdictional rules and the need to develop choice of law rules suggests that the factors underlying jurisdictional rules should, at least in some respects, be the same as the factors underlying choice of law rules. The question whether jurisdiction should or should not be assumed and the question whether forum law should or should not be applied are parallel questions; both ask "what moves us to apply, or to refuse to apply, our legal system to the dispute at hand?" The answer to these questions may be partially provided by considering why courts might be led, in certain cases, to refuse jurisdiction. Both the limits on assumption of jurisdiction and the rules which at times cause a court to apply foreign law indicate something very basic about systems of law, or sets of rules.

Each jurisdiction, with its own particular set or system of rules, is limited geographically, in the sense that its laws were developed to cope with problems in that jurisdiction, i.e., in cases that are not geographically complex. No one set of rules can reasonably have the hubris to assert that it represents legal or moral perfection, or absolute justice. It is partly because of this non-absolutism of legal systems that jurisdictional limits are necessary. It is also the case that no jurisdiction desires to provide a judicial forum for all the world. For example, an Ontario court might consider refusing to hear a case involving a British plaintiff injured in a motor vehicle

accident which occurred in Britain because of the alleged negligence of an American driver. If a court does accept jurisdiction in such a case it might embark on an investigation of how the rule of decision should be determined. This freedom to choose laws, instead of simply to apply the substantive law of the forum, seems justified by the weakness of the geographical nexus between the forum and the facts of the case. A decision to apply a foreign rule law is, in effect, an admission that the forum law is neither absolute perfection nor universally appropriate. That is, there is a sense of geographical limits on a particular jurisdiction's sense of justice and of order. There is a question as to how far afield a particular rule of law can be sensibly applied. These issues have recently been given vivid point by a recent decision of the Supreme Court of Canada that links issues of jurisdiction to the limits on provincial sovereignty under the *Constitution Act, 1867.*

We mentioned in the Introduction to these Materials that there may sometimes be disputes arise over what it means to say that a court "applies" its own rules or those of some other jurisdictions. These disputes are about something that, in one sense, is little more than a semantic quibble. We need, as we said earlier, to be able to distinguish between domestic rules of decision and rules that might make reference to, or perhaps, incorporate ideas, concepts or solutions from other jurisdictions. What we have to focus on is the source for the criteria used by the court to deal with a particular problem. Will these criteria be found in decisions of the forum court in cases that were not geographically complex or in rules of another jurisdiction in similar cases? (We shall see later that perhaps these decisions of both courts are inapplicable in a case that is geographically complex. If this argument is valid a conflicts case may properly justify the use of a criterion that is not the same as any decision reached by any court in a case that is not geographically complex.)

Thus far we have speculated about some of the limits which inhere in particular bodies of law; such speculation helps us to begin to formulate a rationale for limits on the assumption of jurisdiction and on the application of forum law. At this juncture we should briefly examine present jurisdictional rules, both because of their practical importance and because a familiarity with these rules will facilitate a critical appraisal of how they interact with choice of law rules. It should be emphasized that the following summary of jurisdictional rules is incomplete; it does not purport to cover the very complex procedural question involved in the law of assumption of jurisdiction. Rather, it is offered as a base from which you can begin to consider jurisdictional limits as a possible alternative, in some cases at least, to choice of law. Remember that the jurisdictional rules were not fashioned with choice of law rules specifically in mind.

For an excellent general discussion of the issues of judicial jurisdiction, albeit at least partly from the perspective of the American Constitutional position, see, Von Mehren and Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis" (1966), 79 *Harv. L. Rev.* 1121. A much briefer, but excellent discussion of Canadian law is found in Sharpe, *Interprovincial Product Liability Litigation* (Toronto: Butterworths, 1982).

The basic position from which to start any analysis is that the jurisdiction of any court is territorial. This statement means that the Ontario Court, General Division, for example, has jurisdiction over those who are properly served in Ontario. Service in Ontario is required

because the form of the writ of summons[1] that started common law actions for several centuries. That form was that of a command of the sovereign directing the defendant to answer the plaintiff's claim. Only those subject to the sovereign could be brought before the courts of that sovereign, and sovereignty was seen as essentially territorial. The notion of citizenship was a much later development, one which had its origins as an important aspect of international law in writings in the civil law tradition.

The law now is that any one who is properly served in Ontario is subject to the jurisdiction of the Ontario court. The question of what is proper service is established by the Rules of Civil Procedure. Generally speaking, and subject to the rules to be discussed shortly, proper service requires personal service. The notion of personal service as applied to an individual is fairly easy to understand: it is the delivery of the Statement of Claim into the hands of the defendant and the subsequent execution of an affidavit of service. Many potential defendants are, of course, not individual human beings but corporations of one kind or another. As regards these bodies special rules are required. The details of these rules are not important for our purposes here. The rules of court can be checked to determine what is necessary. See, Ontario, *Rules of Civil Procedure*, Rule 16.01.

Geographically complex cases present the courts with four general problems:

(a) Are there any rules which disable the court from hearing the case at all?

(b) Should the court, as a matter of justice and fairness to the litigants, refuse to hear a case even though the defendant has been properly served in the jurisdiction?

(c) To what extent is a court justified in asserting a power to hear a case in circumstances when the defendant is outside the borders of the court's jurisdiction?

(d) Should the court enjoin one of the parties from continuing with proceedings she may have launched in a foreign court?

RULES EXCLUDING THE JURISDICTION OF THE COURTS

1. Personal Exclusions

The principal exclusion in this category relates to the rules regarding sovereign immunity. A Canadian court cannot assert jurisdiction over foreign sovereigns or their representatives.

The topic will not be extensively explored here: it is more properly an issue of public international law. The question is governed by legislation in Canada, see *State Immunity Act*,

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[1] The replacement of the old Writ of Summons by an originating process under the new Ontario *Rules of Civil Procedure* has no impact on this theoretical background.

R.S.C. 1985, c. S-18 and various *Privileges and Immunities Acts*, e.g., *Foreign Missions and International Organizations Act*, S.C. 1991, (Bill C-27), which adopts parts of the Vienna Conventions on Diplomatic and Consular Relations. The United States legislation is the *Foreign Sovereign Immunity Act*, 28 U.S.C. §1602; in the United Kingdom, it is the *State Immunity Act* 1978, c. 33 and *The Diplomatic and Other Privileges Act* 1971, c. 64, Schedule. There is also a *European Convention on State Immunity* 1972, 11 I.L.M. 470 (in force 1976). See also Bouchez, "The Nature and Scope of State Immunity from Jurisdiction and Execution" (1979), 10 *Neth. Y.B. Int'l L.* 3. As the title of this article indicates it may be possible to get a court to take jurisdiction in the face of an argument that the defendant is a foreign sovereign, but another matter altogether for the successful plaintiff to be able to recover on the judgment by a writ of seizure and sale. You should simply note that the problem of sovereign immunity presents both issues.

Most of the recent cases arise from the increasing use by governments of national trading organizations. A socialist country like the former U.S.S.R. used to conduct all its international commercial relations through state trading corporations. These organizations are not entitled to sovereign immunity, and there are exclusions in the legislation for such organizations. Environmental disasters like the oil pollution in the Bay of Campeche caused by the blow-out of an oil well drilled by Pemex, the Mexican state oil corporation, create serious jurisdictional problems, for the damage may be done over a wide area, and the potential defendant may be protected by sovereign immunity.

In addition to the problems caused by claims of state sovereignty in the international context, there are problems of provincial sovereignty when a province is sued in a Canadian court. It may be expected that a province may only be sued in its "own" courts. The Federal Court does not have power to hear disputes between two provinces.

Issues of sovereign immunity are not usually the staple diet of even the busiest litigation lawyer. Of much more practical concern to many lawyers is the provision of the *Extra-Provincial Corporations Act*, R.S.O. 1990, c. E.27, s. 21. which provides:

> **21.** (1) An extra-provincial corporation within class 3 [a corporation incorporated or continued under the laws of a jurisdiction outside Canada] that is not in compliance with section 19 or has not obtained a licence when required by this Act, is not capable of maintaining any action or any other proceeding in any court or tribunal in Ontario in respect of any contract made by it.

An extra-provincial corporation is required to have a licence whenever it carries on any of the activities set out in subsection 1(2). The list of activities is fairly comprehensive.

2. Subject Matter Exclusions

The power of provincial courts to hear cases may be limited by a number of factors. The first two limits arise from the history of the grant of self-government to the colonies that eventually became Canada and from the nature of the Canadian Federation. The common law courts of England had, for example, no power to grant divorces. The courts that existed in provinces for

which the "cut-off" date for English law was earlier than 1857, (the year when the British Parliament first gave the courts power to dissolve marriages) shared this disability: they had no power under the common law to grant divorces. The colonial Assemblies of New Brunswick and Nova Scotia had given their courts power to dissolve marriages before 1857. Courts in the Western provinces which did not cut themselves off from the effect of English law until after 1857 had this power under their reception of the English law (including English statute law) at the date of their creation and the grant of self-government. After Confederation and as a result of the federal jurisdiction over marriage and divorce, no province could introduce legislation to give their courts jurisdiction to grant divorces. The unsatisfactory patch-work of provincial jurisdiction in this area was finally resolved by the *Divorce Act* of 1967. Petitions for divorce must now be brought under the provisions of the *Divorce Act, 1985*, R.S.C. 1985, c. 3 (2nd Supp.)

A second limitation may arise because the jurisdiction may be given by federal legislation to some other court. Thus provincial courts have no jurisdiction over the matters under the exclusive jurisdiction of the Federal Court of Canada. The *Federal Court Act*, R.S.C. 1985 c. F-7, confers jurisdiction on the Federal Court in admiralty matters, federal taxation matters, actions against the federal crown and federal administrative agencies. The principal issue for conflicts purposes is the exclusive jurisdiction of the Federal Court under the law of admiralty. It has been held that a provincial court has no jurisdiction regarding a claim arising from a collision between two ships at sea: *Cull v. Rose* (1982), 37 Nfld. & P.E.I.R. 476, 139 D.L.R. (3d) 559 (Nfld. S.C. T.D.). For some other, and somewhat exotic problems, see *ITO – International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641.

A third exception, and one that has particular relevance for conflicts, is the rule that a court, i.e., a provincial court of general jurisdiction, cannot hear an action regarding a claim to foreign land. This rule is based on the case of *British South Africa Co. v. Companhia de Moçambique*, [1893] A.C. 602, (H.L.). The House of Lords there held that an English court could not hear an action involving foreign land, even though no claim of title was made and even though the action lay in tort for trespass. It is by no means obvious that the *Moçambique* rule (as it is always referred to) has to apply between Canadian provinces. Four years before *Moçambique*, in *Campbell v. MacGregor* (1889), 29 N.B.R. 644 (S.C.), an action for damages to Québec land was permitted in a New Brunswick court. The court saw no particular problems in permitting such an action to proceed. Yet in the first Canadian case to raise the issue after *Moçambique*, *Brereton v. Canadian Pacific Railway Co.* (1898), 29 O.R. 57 (H.C.), the court followed the House of Lords decision. This attitude was followed in *Albert v. Fraser Companies*, [1937] 1 D.L.R. 39, (N.B.S.C., A.D.). The objection usually raised to a court's hearing an action involving foreign land is that any judgment could only be enforced in the jurisdiction where the land is and that it would be absurd for an Ontario court, for example, to determine any matter of title to British Columbia land. As between sovereign countries, this objection may have some force; as between Canadian provinces, it has far less. Any provincial court is subject to the control of the Supreme Court of Canada and, as we have seen, that court has power to take judicial notice of the laws of all the provinces and to pronounce authoritatively thereon.

We referred earlier to the case of *Logan v. Lee* (1907), 39 S.C.R. 311. Counsel for the defendant, in argument before the Supreme Court, had relied on the proof of the law of New Brunswick as found by the court in Québec before which the action had been brought. Sir Charles Fitzpatrick C.J.C. interrupted counsel and said: (p. 313)

> I think it proper that I should here announce, after having consulted my brother judges, that this court, constituted as an appellate tribunal for the whole Dominion of Canada, requires no evidence as to what laws may be in force in any of the provinces or territories of Canada. This court is bound to . . . take judicial notice of the statutory or other laws prevailing in every province and territory of Canada, *sua motu*, even in cases where such laws may not have been proved in evidence in the courts below, and although it might happen that the views as to what the law might be, as entertained by the members of this court, might be [sic] in absolute contradiction of any evidence upon those points adduced in the courts below.

The *Moçambique* rule was affirmed by the House of Lords in the next case.

Hesperides Hotels Ltd. v. Muftizade
[1979] A.C. 508, [1978] 2 All E.R. 1168.
(H.L., Lords Wilberforce, Dilhorne, Salmon, Fraser & Keith)

[The plaintiffs, the appellant corporation and another corporation, both owned by Greek Cypriots, had owned two hotels in the part of Cyprus which was, after 1974, in the hands of the Turks. After the invasion by Turkey, the owners of the corporation fled to that part of Cyprus which remained Greek. The plaintiffs discovered that a corporation, Aegean Turkish Holidays Ltd., on behalf of The Turkish Federated State of Cyprus, was offering tours and taking bookings for the hotels. The defendants, the respondents, were the London representative of the Federated State and the corporation. The plaintiffs brought an action against the defendants for damages for conspiracy, an account of profits and for an injunction to prevent the defendant from conspiring to procure acts of trespass to the hotels. The respondent brought a summons i.e., interlocutory proceedings, to have the action struck out on the grounds that the Federated State was a foreign sovereign, and on the basis that the *Moçambique* case applied.

[The trial judge held, on the basis of a statement from the Foreign Office, that the Federated State was not a sovereign state, but that he had jurisdiction to award damages for conspiracy when the conspiracy occurred in England and there were overt acts there. A consent order was made against the corporation. The Court of Appeal, however, (*sub nom. Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd.*) [1978] Q.B. 205, [1978] 1 All E.R. 277, allowed the representative defendant's appeal on a variety of grounds. The plaintiffs appealed to the House of Lords.]

LORD WILBERFORCE, after stating the facts and the history of the litigation, continued:

I shall consider first the question whether the present action is precluded by the rule in the *Moçambique* case. The appellants' arguments are threefold. First, they contend that the rule established by that case has no application where there is no dispute as to the title to foreign land and (I use their words) "no real dispute over the right to possession of the foreign land". This result, they say, can be reached by a process of interpretation of the decision of this House

3 All ER 77, [1966] 1 WLR 1234) do not exist and that the rule should be maintained in this House. The consequence is that the appellants' action, as regards the hotels themselves, being land situate abroad, cannot be maintained. In view of this conclusion it is not necessary to enter on the questions raised by the respondent's counsel as to the degree of notice (if any) which the courts should take of the situation in Cyprus and of "laws" passed by the non-recognised Turkish Federated State of Cyprus. These gave rise to an interesting and learned argument for which the House is indebted but having regard to the nature of the issues raised I think that the present is not the occasion to pass on them.

There remains the appellants' claim as regards the chattel contents of the hotels. To this the *Moçambique* rule has no application. Moreover the alleged "laws" passed in the Turkish Federated State of Cyprus do not extend to the chattels. The Court of Appeal, however, struck out this part of the appellants' claim on the ground that for such a claim to be admissible the plaintiffs must be in possession of the chattels in question. But a claim could validly be laid in conversion: the appellants allege sufficient facts to support such a claim and it is not necessary in modern pleadings to attach a specific label to it if the factual basis is there, so the claim can be asserted without amendment. *Albert v. Fraser Companies Ltd.*, [1937] 1 D.L.R. 39, on which the respondent relied does not assist him, for in that case there was no direct allegation in the plaintiff's statement of claim of any trespass to his personal property (see per Baxter C.J., [1937] 1 D.L.R. 39 at 46). In the present case interference with the appellants' chattels is distinctly alleged and, moreover, no local law is relied on as justifying the interference.

I would allow the appellants' appeal so far as to permit the action to continue as regards the chattels but I would uphold the order striking out the writ and substantive claim so far as it elates to land or immovable property in Cyprus.

NOTES AND QUESTIONS

1. Do you think that the House of Lords (and the British Government) were, shall we say, not unhappy about being able to avoid a decision on the legality of the Turkish invasion of Cyprus? Is this ground alone a sufficient justification for the rule? The rules regarding the immunity of foreign sovereigns has a similar justification.

2. In both *Moçambique* and *Albert v. Fraser Companies* there was no other court that offered any effective relief to the plaintiff. In the former case there was simply no court at all, and in the latter, there was the serious risk, as we shall see when we examine the topic of the Recognition and Enforcement of Foreign Judgments, though perhaps now mitigated by the recent decision in *De Savoye v. Morguard Investments Ltd.*, [1990] 3 S.C.R. 1077, [1991] 2 W.W.R. 217, 76 D.L.R. (4th) 256, that any judgment Mme. Albert obtained in Québec would not be enforceable in New Brunswick.

3. It is tempting to suggest that the result in *Moçambique* may have done something to "paint the map of Africa red from the Cape to the Mediterra-

nean." The British South Africa Company, with De Beers Consolidated Mines, was one of Cecil Rhodes' vehicles for the development of South Africa. He was the Prime Minister of the Cape Colony at the time of the judgment in the case.

4. *Dicey & Morris* (10th ed.[2] 1980, pp. 516) summarize the *Moçambique* rule: (Rule 77):

> Subject to the Exceptions hereinafter mentioned, English courts have no jurisdiction to entertain an action for
>
> (1) the determination of the title to, or the right to the possession of, any immovable situate out of England (foreign land); or
>
> (2) the recovery of damages for trespass to such immovable.

The rule is commented on by the editors: (most footnotes have been omitted: those that remain are in the text in square brackets)

> The *Judicature Act 1873* and *Rules of Court* made thereunder abolished local venues, and accordingly it was arguable that there was no longer any reason why English courts should not decide questions of title to foreign land or at least grant damages *in personam* for trespass thereto.
>
> But in *British South Africa Co. v. Companhia de Moçambique* the House of Lords decided that "the grounds upon which the courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situate abroad were substantial and not technical, and that the rules of procedure under the Judicature Acts have not conferred a jurisdiction which did not exist before." [[1893] A.C. 602, 629] In *Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd.*, [[1979] A.C. 508] the House of Lords was asked to depart from the Moçambique rule, but decided not to do so. Lord Fraser conceded that the result might be that the plaintiff would be left without a remedy; that it was difficult to justify the rule except on historical grounds; and that it was neither logical nor satisfactory in the result. [At pp. 543-544] The House of Lords also held (1) that the rule could not be circumvented by framing the action so as to claim damages for a conspiracy in England to procure acts of trespass to land situated abroad; and (2) that the rule does not pre-

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[2] The rule stated in the most recent edition of *Dicey & Morris* (11th ed.) is inapplicable in Canada as the United Kingdom is now a party to the 1968 Brussels Convention which provides a legislative basis for the jurisdiction of the English courts.

> vent an action for damages for trespass to chattels in a building situated abroad. ... It has been held in Canada that the rule does extend to torts other than trespass. [*Brereton v. Canadian Pacific Railway* (1897), 29 O.R. 57; *Albert v. Fraser Companies*, [1937] 1 D.L.R. 39; criticised by Willis (1937), 15 Can. Bar. Rev. 112; contrast *Malo and Berthrand v. Clement*, [1943] 4 D.L.R. 773, where the action was entertained although title was in issue.]
>
> If the *Moçambique* rule is one of policy, as it was held to be in the leading case, the better opinion would seem to be that it cannot be waived by any agreement between the parties.

5. The following exceptions are generally admitted to the rule:

(a) where the court has jurisdiction *in personam* because of a contract (see *Companhia de Moçambique v. British South Africa Co.*, [1982] 2 Q.B. 358, 364), fraud (*Burns v. Davidson* (1892), 21 O.R. 547 (C.A.)), trust *(Hawks v. Hawks* (1921), 59 D.L.R. 430 (S.C.C.), [1921] 3 W.W.R. 285, affirming [1920] 3 W.W.R. 774, 56 D.L.R. 265 (Can.)); or partnership (*Kung v. Kung* (1990), 42 B.C.L.R. (2d) 145 (C.A.)); and

(b) where the court has jurisdiction to administer an estate or trust which includes movables or immovables in Canada (*Re Ross*, [1930] 1 Ch. 377), as well as foreign land; and

(c) where the court has jurisdiction *in rem* against a ship (*Federal Court Act*, R.S.C. 1985, c. F-7, s. 22(2)(3), s. 43).

3. In recent years some lower courts have appeared reluctant to apply the *Moçambique* rule in its full rigour. In *Godley v. Coles* (1988), 39 C.P.C. 162 (Ont. Dist. Ct.), for example, the plaintiffs brought an action for damage to their condominium in Florida caused when the defendants' toilet leaked. The defendants owned the condominium immediately above the plaintiffs'. All parties were Ontario residents. The defendants brought a motion for an order directing that the court lacked jurisdiction, but Carnwath D.C.J. dismissed it, noting that title was not in issue and that a substantial portion of the claim concerned damage to movables. As for *Moçambique*, he wrote (at 166) that:

> the application of the rule in *Moçambique* should be restricted to the facts of that case and . . . it should not be taken for authority that wherever damage to land is included in the statement of claim, that an action for negligence to recover those damages should be

precluded from being brought in the Province of Ontario where the land is situate elsewhere.

For another restrictive reading of *Moçambique* see *Pioneer Metals Corp. v. Pegasus Gold Inc.* (1990), 44 B.C.L.R. (2d) 79 (S.C.).

There are other analogous problems which may, as a practical matter, be even more important than the land cases. We can mention two:

(a) In *Tyburn Productions Ltd. v. Conan Doyle*, [1990] 1 All E.R. 909, (Ch. D., Vinelott J.) the plaintiffs had made a TV movie using the characters of Sherlock Holmes and Dr. Watson, characters originally created by Sir Arthur Conan Doyle. The U.K. copyright on Conan Doyle's works expired in 1980 (50 years after his death). Sir Arthur's daughter claimed that, under U.S., law she was entitled to the copyright in her father's work. The plaintiff believed that an action brought in the U.S. for a declaration that the film did not infringe her copyright would fail and therefore sought in England, (i) a declaration that the defendant had no copyright in the characters of Sherlock Holmes and Dr. Watson, and (ii) an injunction restraining her from asserting that she had rights to stop the distribution of the film in the U.S. The defendant moved to have the pleadings struck out. The judge held that the validity of the defendant's claim should be determined by U.S. law and that, applying the analogy of the *Moçambique* case, the issue of the defendant's copyright should be dealt with in the U.S. courts, not in the English courts.

(b) Various remedies that a shareholder or other person may have against a corporation permit the court to make sweeping orders which may include, for example, orders to rectify the share registers of the corporation. Section 247 of the Ontario *Business Corporations Act* sets out a wide range of things that the court may do to give relief in an oppression action. May orders like those set out in s. 247 only be made by an Ontario court in respect of a corporation incorporated under the OBCA? It is common for the shares of a subsidiary corporation to be pledged as security for a loan made to the parent corporation. Many of the loans made to Olympia & York were so secured. Where should an action to enforce that security be brought?

OTHER RESTRICTIONS ON TAKING JURISDICTION

1. *Forum Inconveniens*

As we have seen, considerable concern has been expressed over the evils—evils that are assumed to exist without much examination—of "forum shopping". Much of the traditional justification for the choice of law process is based on the assumption that the rules must (or will) operate to discourage forum shopping. As we saw, the maintenance of that assumption requires some intellectual determination in the face of rules which, like those in *Phillips v. Eyre*, seem to do little else but encourage forum-shopping, to say nothing of the evidence that different jurisdictions would *not* reach the same result were the case litigated before their courts.

We now face the rules which address directly the issue of the extent of the freedom of the plaintiff to choose the forum in which to have his, her or its case litigated. The ability of a plaintiff to bring an action where he chooses presents him with the opportunity to put pressure on the defendant. A careful selection of the place where the defendant is required to defend may significantly increase the costs of the defence. As we will see in the next section, dealing with the enforcement of judgments, the extent of the plaintiff's choice of where to sue was (and may even still be) limited by the inability to obtain a judgment which would be enforceable in the jurisdiction where the defendant has assets. For some potential defendants, however, the plaintiff has a very wide choice of available jurisdictions. Banks, insurance companies, the national railways and airlines and other corporations that do business across Canada and in several countries can often be effectively served in every province and territory of Canada and even in many countries of the world. Union Carbide, for example, could be sued in India for damages arising from the Bhopal tragedy and in probably every state in the U.S.A. The plaintiffs' choice of an American jurisdiction, the United States District Court for the Southern District of New York, was motivated by their desire (or, perhaps equally accurately, their lawyers' desire) to maximize the damages that might be recoverable in America as opposed to India.

It is generally accepted that the court has an inherent power to control what is regarded as an unfair exercise of the plaintiff's choice of forum. The early view of this power was, as the next case illustrates, based on the court's inherent power to prevent an abuse of its process. Later cases have modified the notion of what standard of "abuse" must be shown by the defendant before the court will intervene, and as we shall see, the narrow basis for interference or for limiting the plaintiff's freedom has been considerably expanded.

The principal issue presented by the problem is whether the court should be plaintiff- or defendant-oriented. This focus finds expression in the question, should the defendant have to prove that the court before which it has been compelled to defend itself is an inconvenient forum or should the plaintiff have to prove that the court is a convenient forum? The courts initially took the position that the defendant had to show that it was vexatious and an abuse of the court's process for the plaintiff to invoke it. The next case illustrates this point of view.

the respondents it is said, truly enough, that the Court will not lightly interfere with a plaintiff's selection of the forum, as it will not in the case of his selection of venue for the trial. Of the cases cited to me by counsel for the respondents, the only one which seems to be at all in point is *Anderson et. al. v. Thomas*, [1935] O.W.N. 228, [1935] 3 D.L.R. 286, in which Kingstone J. declined to stay an action arising from loss sustained in a motor accident in Ontario where the plaintiffs and the defendant all resided in Ohio. He found under the circumstances that no substantial inconvenience would be inflicted on the defendant and it may be observed that the applicable law was that of the place of wrong.

After perusal of the affidavit of the applicant's Toronto manager, with the material annexed thereto, and the pleadings in this action, there being no affidavit filed on behalf of the respondents, I am also of the opinion that all the circumstances point to an attempt by the latter to force a settlement by the applicant in order to avoid the costs or inconvenience of trying this case in an inappropriate jurisdiction. Indeed, the element of frivolity can be seen as clearly discerned, as in the *Van Vogt* case, and, as far as the applicant is concerned, it is sufficiently vexatious to require the same disposition on my part. One other aspect of the case should perhaps be mentioned. In *Egbert v. Short*, *supra*, Warrington J. appeared to be influenced by the fact that the plaintiff in that case might not even be required to attend at trial in England, whereas the defendant would be undoubtedly faced with a long and expensive journey by sea with his witnesses and materials. In these days of swift and economical air travel, even if the respondent plaintiffs attended the trial in person, delay and expense in going to England from Illinois as compared with going from there to Ontario is not the consideration which it might have been at an earlier day, and indeed all the disadvantages of the situation would rest with the applicant and the Court of a forum which I find to be *non conveniens*.

At the conclusion of the argument, I indicated that if I allowed the application, I would stay rather than dismiss the action. But since there is no question of the merits of the case being here involved and in accordance with the evident tenor of the authorities that I have examined, and since all possible parties are before me, the proper disposition under the circumstances of this case is the action should be dismissed with costs.

An order will go to this effect and the applicant will also have its costs of the motion.

Action dismissed.

NOTES

1. Notice that the defendant, as a multi-national insurer, could be personally served in a very large number of jurisdictions in the world. The *Insurance Act*, R.S.O. 1990, c. I.8, s. 54, illustrates the kind of legislative provision that makes service easy.

2. The restrictive test applied in *Moreno v. Norwich Union* has been relaxed in more recent English cases which have applied a "balance of conveni-

ence" test as between plaintiff and defendant. In *The Atlantic Star* a collision occurred in Belgian waters between a Dutch ship, the "Atlantic Star" and Dutch and Belgian barges. Proceedings were begun in Belgium that were likely to end favourably to the defendants. The plaintiffs, the barge owners, brought an action in England. The defendants argued that it was not convenient to bring the action in England. Lord Denning, M.R., in the Court of Appeal, upholding the decision of the trial judge, said; ([1973] Q.B. 364, 381-82, [1972] 3 All E.R. 705, 790)

> No one who comes to these courts asking for justice should come in vain . . . . This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this "forum-shopping" if you please, but the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.

The House of Lords reversed the Court of Appeal and stayed the action. Lord Reid in his judgment said ([1974] A.C. 436, 453, [1973] 2 All E.R. 175, 181) that the statement by Lord Denning, quoted above, recalled, "the good old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races". Lord Reid was a Scottish judge. (See also, Williams, "The English are Best" (1977), 8 V.U.W.L. Rev. 358.)

The law stated in *The Atlantic Star* was developed in *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795, [1978] 1 All E.R. 625, (H.L.) and further in:

Spiliada Maritime Corp. v. Cansulex Ltd.
[1986] 3 W.L.R. 972, [1986] 3 All E.R. 843, (H.L.)
(Lords Keith, Templeman, Griffiths, Mackay and Goff)

> [Damage to two ships occurred when wet sulphur was loaded into the ships in British Columbia. An action was brought by one shipowner in England for damages for the loss arising from the action of the sulphur in causing severe corrosion to the ship. The ship, the "Spiliada" was Liberian. It was owned by a Liberian corporation, managed partly in Greece and partly in England. The insurers were English. The owners of the second ship, the "Cambridgeshire" who were insured by the same insurer, commenced an action in England using the same lawyers as the owners of the "Spiliada".
>
> [The plaintiffs obtained leave to serve the defendants, the sulphur exporter, *ex juris*. The defendant argued that the service should be set aside. The trial judge refused; the owners appealed to the Court of Appeal. Before the Court of Appeal, the plaintiffs maintained that since the action was statute-barred in British Columbia, the plaintiffs would be deprived of a legitimate juridical advantage by being forced to sue in B.C. The Court of Appeal allowed the defendant's appeal, holding that neither the expenses so far incurred in the English proceedings nor the existence of the limitation period in B.C. were sufficient reasons for continuing the action in England. Reliance was placed on

NOTES

1. The *Atlantic Star* has been applied in some Canadian cases. In *Vancouver Island Helicopters Ltd. v. Robertshaw Controls Ltd.* (1980), 30 O.R. (2d) 283; 116 D.L.R. (3d) 716 (High Ct., leave to appeal to Divisional Court refused, Nov. 18, 1980), the Court used Lord Wilberforce's test of balancing the interests of plaintiff and defendant; in *Kuhr v. The Ship "Friedrich Busse"* [1982] 2 F.C. 709, 134 D.L.R. (3d) 261 (T.D.), the court said that *forum non conveniens* should not be used to prevent the court from taking jurisdiction over such an elusive asset as a ship, when the ship was arrested in the jurisdiction. When a ship is arrested, the action is a proceeding against the ship itself, i.e., it is a proceeding *in rem* and the jurisdiction of the court does not depend on service on the defendant, but on the power to arrest the ship in Canadian waters.

2. In *Rogers v. Bank of Montreal*, [1984] 2 W.W.R. 597, 49 B.C.L.R. 85, 4 D.L.R. (4th) 507, (leave to appeal to S.C.C. refused 55 N.R. 236n) the British Columbia Court of Appeal made a very complete survey of the cases on the issue of forum conveniens. In that case the majority of the court refused to grant a stay, applying the strict test of *Moreno v. Norwich Union*, and holding that a stay would only be granted if the plaintiff's choice would be vexatious or an abuse of the process of the court. Carrothers J.A. dissented on the ground that the rules applicable between provinces should not be that same as those between international states.

3. The justification for choice of law rules is often put on the basis that "forum-shopping" has to be or should be discouraged. Consider the relation between that justification or purpose for choice of law rules and the rules governing the taking of jurisdiction. If, for example, it is relevant that the plaintiff has, by suing in a particular jurisdiction, a "legitimate personal or juridical advantage" and that the defendant has to show that the plaintiff should not be entitled to keep this advantage, we have not done much to discourage forum-shopping, have we? Perhaps we have only encouraged "legitimate forum-shopping", but if so, what distinguishes the permissible kind from the impermissible kind? If we are ambivalent about forum-shopping, what should be the correct approach to it? Inconsistencies like this often indicate that underlying theory is inadequate. We shall have to consider if criteria can be developed that would permit issues of choice of law and issues of jurisdiction to focus on the same concerns.

4. Lord Goff refers (*supra*, page 239) to United States and Canadian approaches to the issue of *forum non conveniens*. He mentions that a federal system may affect those courts approaches. Keep constantly in mind the need to consider the applicability in Canada of approaches to inter-jurisdictional issues of all kinds developed in a country like England.

5. One of the most important issues in conflicts (and one that is largely neglected in traditional Anglo-Canadian writing on the topic) is the existence of special problems arising from the fact that Canada is a federation. Very few, if any, conflicts issues are the same if we compare their resolutions in the context of a federal systems and outside such a context. The recent case of *De Savoye v. Morguard Investments Ltd.*, [1990] 3 S.C.R. 1077, [1991] 2 W.W.R. 217, 76 D.L.R. (4th) 256, (*infra* page ?) picking up and developing a judgment of the Supreme Court, *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, [1974] 2 W.W.R. 586, 43 D.L.R. (3d) 239, reversing, [1972] 5 W.W.R. 456 (Sask. C.A.), which reversed, [1972] 3 W.W.R. 161, (*infra*, page ?) may now become the basis upon which Canada will build a Canadian law of both jurisdiction and the recognition and enforcement of foreign judgments that will reflect Canada's constitutional values—perhaps now to be seen as part of the various proposals for a closer economic union between the provinces[3]—and not those of the United States or the peculiar view of the English.

2. Contractual Limits on Forum Selection

It is common in many international contracts for the parties to specify both a law to "govern the contract" and a place where any disputes may be litigated or arbitrated. The effect of such clauses has generated a large and complex body of rules. We will only briefly explore the issues in these materials and here we are only concerned with a clause dealing with the place where any disputes may be litigated. There are two kinds of clauses. The first is one where the parties agree to submit their disputes to the courts of a particular jurisdiction but without specifying that that court shall have exclusive jurisdiction. The second is where exclusive jurisdiction is conferred on a specified court.

Clauses dealing with the place where an action may, or must be brought are common. Check, for example, any standard contract for computer software and the chances are very good that you will find that an action can only be brought in the courts of California, or wherever the vendor is. A choice of jurisdiction clause or an attornment clause may be exclusive or non-exclusive. A non-exclusive choice of the Ontario courts makes them competent (subject always to the courts' discretion to protect its process and to prevent abuse) to hear the case and makes any judgment that they may give enforceable against the defendant in most countries of the world.

Courts are sometimes concerned about the enforcement of an exclusive clause: a clause providing that only one court shall hear any dispute. If such a clause is used, it will be no better than the contract that contains it. If the contract is unfair or unconscionable the choice of jurisdiction clause may fall with any other clause. Conversely, if the contract is not unfair, it is hard to see what grounds there might be for refusing to give it effect. In *E.K. Motors Ltd.*

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[3] This sentence was originally written in January 1992. As we revise the materials in July 1992, we do not know what to say, so we have left what we said as, perhaps, no more that a statement of what we had hoped might have come to pass.

v. Volkswagen Canada Ltd., [1973] 1 W.W.R. 466, the Saskatchewan Court of Appeal enforced a clause in an agreement between a Saskatchewan car dealer and the manufacturer's distributor in Canada that made the Ontario courts the only competent court. The clause in that case stated simply that "This Agreement is subject to the laws of the Province of Ontario and to the exclusive jurisdiction of her courts." The case is good authority for the enforceability of such a clause because enforcement led to the Saskatchewan court denying that it had jurisdiction. On the other hand, there were special circumstances, involved litigation and other actions that the parties agreed should be dealt with in Ontario that may dilute its effect. Exclusive jurisdiction clauses that take away judicial business, like arbitration clause have often been looked as askance and as somehow improper. Provided that the deal is fair and that there can be nothing objectionable in the choice of jurisdiction clause, we see no reason that would justify treating them with any special rules.

The traditional English attitude to any choice of forum clause was that the court was regarded as having some special kind of dispensing power to control the exercise of contract power when there is a forum selection clause. See, e.g. Becker & Collins, "The Chaparral/ Bremen Litigation: Two Commentaries" (1973), 22 *Intl & Comp L.Q.* 329 at 335. For some time American courts considered that a clause "ousting"—an appropriately evocative word—the jurisdiction of the American courts was contrary to public policy. Such clauses were ineffective in excluding recourse to American courts. The law was changed with the decision of the United States Supreme Court in *M/S Bremen v. Zapata Off-Shore Corp.* (1972), 92 S.C.R. 1907. (This litigation is that referred to by Becker & Collins (*supra*).)

In *Zapata* a contract for the towing of an off-shore oil drilling platform from the Gulf of Mexico to the North Sea provided for the exclusive jurisdiction of the English courts. In reversing the two lower courts, Chief Justice Burger said, (pp. 1913 and 1915)

> Forum selection clauses have historically not been favoured by American courts. Many courts . . . have declined to enforce such clauses on the ground that they were "contrary to public policy", or that their effect was to "oust the jurisdiction" of the court.
>
> There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence or overweening bargaining power should be given full effect . . . . The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting. There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms with the consequences of the forum clause figuring prominently in their calculations.

The similarity in both attitude and result to the English and Canadian courts' treatment of "exemption clauses" is obvious. The same solution is available to deal with both problems: if the deal is fair, enforce it; if it is not fair, the clause may be reviewed—what's so difficult about that? Two important issues are relevant here and they cut across almost all of the law. The first is that many contractual issues are "balkanized"—a word whose meaning has now a frightening

(The Judgment contains an extensive account of the history and development of the rules regarding service *ex juris*). In the result the plaintiff was allowed to serve the writ in England. *Singh v. Howden* is in the same tradition as the nineteenth century cases on the same topic. A more realistic view is found in the judgment of Brooke J.A. in *Jannock Corp. v. R.T. Tamblyn & Partners Ltd.* (1975), 8 O.R. (2d) 622 at 632; 58 D.L.R. (3d) 678 at 688 (C.A.) reversing (*sub nom. Atlantic Sugar Co. v. R.T. Tamblyn & Partners Ltd.* (1974), 3 O.R. (2d) 195, 45 D.L.R. (3d) 28, leave to appeal to Supreme Court refused 8 O.R. (2d) 622n).

> In my view [the trial judge] ought to have distinguished [the cases relied on by her to justify her decision to refuse leave to serve the writ out of Ontario] on the ground that the defendants there in question were residents of far distant places—England in one case and Australia in the other. Here, [the defendant] is a member of the Canadian business community. It seems quite unrealistic to treat as a foreigner one who lives in a Province of this country and does business in his own and other Provinces. Having regard to business by residents of the Provinces with one another, neither the boundaries of the country nor its political divisions or judicial divisions are such as to make the joinder of defendants in an action, as here sought, of parties to a business transaction who do not reside in the same Province oppressive and unfair *per se*.
>
> . . . In cases such as this one . . . the fact that a defendant resident in another Province is a "foreigner" should not be given any significant weight and I find the error in principle made by [the trial judge] was in giving undue significance to the fact that [the defendant] is a "foreigner". . . .
>
> . . . [M]ost important she erred in failing to give little weight to the view expressed in the older cases respecting foreigners in their application to persons who live in other Provinces in this country.

The following cases discuss the issue of service *ex juris*.

Moran v. Pyle National (Canada) Ltd.
[1975] 1 S.C.R. 393, [1974] 2 W.W.R. 586, 43 D.L.R. (3d) 239
(Martland, Judson, Spence, Laskin and Dickson JJ.)

> The judgment of the Court was delivered by DICKSON J.: — This appeal from the Court of Appeal for Saskatchewan presents in a jurisdictional context the question of the place of commission of a tort.
>
> According to the statement of claim, the averments of which I accept as true solely for the purpose of testing jurisdiction, William Franklin Moran, an electrician employed by International Minerals and Chemical Corporation (Canada) Ltd. was fatally injured at or near the Town of Esterhazy in the Province of Saskatchewan while removing a spent light bulb manufactured by the defendant-respondent Pyle National (Canada) Ltd. (Pyle). At the time of the accident Mr. Moran was standing on a ladder propped against a steel "I" beam. While unscrewing the bulb Mr. Moran touched the metal base and was

> adequate remedy abroad. In exercising its discretion the court will also weigh the relative advantages and obstacles to a fair trial. Will the plaintiff be prejudiced by having to sue in the foreign country? The substance of the plaintiff's action must also be considered. To what extent is it connected with the forum? Under the doctrine of *forum conveniens*, the court's assumption of jurisdiction must always be clearly justified. In other words, the plaintiff's choice of jurisdiction must not be oppressive or vexatious, or an abuse of process.

> It must also be remembered that the decision of Judge Hall was made in the exercise of his discretion and should not be interfered with unless it is shown that he erred in the exercise of such discretion by acting on some wrong principle of law or if other grounds establish that the manner in which he exercised his discretion would result in some injustice being done. In my opinion, no such error or grounds have been established by the appellant.
>
> In the result I would grant leave to appeal but would dismiss the appeal with costs.

NOTES

1. *Robinson v. Warren* was ultimately settled before trial on terms favourable to the plaintiff.

2. For more recent examples of the same type, see *Ichi Canada Ltd. v. Yamauchi Rubber Industry Co.* (1983), 43 B.C.L.R. 215, 144 D.L.R. (3d) 533 (B.C.C.A.), affirming (1982), 36 B.C.L.R. 100, 134 D.L.R. (3d) 396, and *Pindling v. NBC* (1984), 49 O.R. (2d) 58, 14 D.L.R. (4th) 391, (H.C.) In the latter case the Prime Minister of the Bahamas brought an action against NBC for defamation published in a broadcast originating in the United States, the trial judge refused to set aside the service *ex juris*.

3. The issue of jurisdiction raised in *Robinson v. Warren* had a direct impact on the choice of law rule applicable on the merits for, under *Phillips v. Eyre*, the choice of forum by the plaintiff determines for all practical purposes the choice of law issue in the case.

4. In *Charlottetown Metal Products Ltd. v. Miles Refrigeration Co. Ltd.* (1980), 30 Nfld. & P.E.I.R. 190, 115 D.L.R. (3d) 63, aff'd, *sub nom.*, *Charlottetown Metal Products Ltd. v. Lucas-California Co.* (1982), 36 Nfld. & P.E.I.R. 115, 134 D.L.R. (3d) 438 (P.E.I. C.A.), another case under the very broad rules of Prince Edward Island, the court considered the appropriate test to determine the extent of the plaintiff's power. MacDonald J. said: (115 D.L.R. (3d) 63, 71,72)

> In the present case there will be an inconvenience to the parties no matter where the case is tried. While the defendant does not have a place of business or agent in Prince Edward Island and did not have any previous contact with this Province prior to the present transaction, the "centre of gravity" was Prince

Edward Island. The Defendant's agent came to Prince Edward Island to work out the details of its proposed contract with the plaintiff, the various components of the freezing equipment were to be either fabricated in Prince Edward Island or shipped here for assembly. Equipment which did not come to Prince Edward Island was shipped direct from England and Japan to Cuba on the instructions of the defendant. There is much more connection with Prince Edward Island than the State of Washington.

I am of the opinion that the *forum conveniens* is in the Province of Prince Edward Island. The plaintiff carries on business in Prince Edward Island; the contract is alleged to have been made here as is the breach; the tort by the defendant is alleged to have occurred in this Province; the ease of having witnesses attend in either the State of Washington or Prince Edward Island is not in issue; the availability of Paul Miles as a witness in the State of Washington has not been shown. Considering the total case, the centre of gravity of the plaintiff's action lies in this Province and it would be just that the trial be held in Prince Edward Island.

. . .

In looking to the substance in the present case it will be a determination of whether there was a contract between the parties and a tort committed by the defendant. The factors from which it will be necessary to determine the answer to these problems are in a large part alleged to be central to Prince Edward Island.

There is one final factor which, in my opinion, does not justify the defendant's application that Prince Edward Island be not used as the forum. Throughout the course of the hearing the defendant contended that the State of Washington was the appropriate forum. At the conclusion of the defendant's counsel's submission he indicated that he was not prepared to say that the defendant would not challenge the plaintiff's action on the ground of lack of jurisdiction either in Nova Scotia or the State of Washington. The defendant stated that it should not be prejudiced by having to indicate a forum where it would not contest the plaintiff's jurisdiction. In my opinion a defendant who contests the plaintiff's choice of forum must indicate a forum which it believes to be the proper one. It would be vexatious and would not be in the interest of justice for the defendant to be allowed to completely deny the jurisdiction of any forum. Where the defendant does not indicate that there is a more convenient forum, the Court has little choice but to accede to the plaintiff's choice.

I am satisfied that my discretion should be exercised by declining the defendant's application and I would dismiss it with costs to the plaintiff.

NOTE ON ACTIONS AND JUDGMENTS *IN REM*

The essence of an action *in rem* is that the decision, a judgment *in rem*, of the court not only binds the parties to the legal relation established by the judgment, but also binds third parties by the same judgment. There are two important situations where actions are *in rem*. They are in Admiralty and in divorce.

The English High Court of Admiralty had power to permit a party to bring an action against a ship or its cargo. The judgment that resulted from such an action permitted the ship or cargo to be sold to satisfy the claim. Such an action was an action *in rem*: it was brought against a thing, not against a person. The admiralty rules are now found in the *Federal Court Act* (R.S.C. 1985 c. F-7). As part of this power the Federal Court has power to arrest a ship in Canadian waters. When a ship is arrested it is required to remain in port until the action is disposed of. In practice, the owner of an arrested ship will usually put up security for the action and get the ship released to earn money. Once the ship has been released by the owner's putting up security, the case proceeds as any ordinary action *in personam*.

The rules regarding arrest and the bringing of an action *in rem* only apply when the ship is within the territorial limits of the court's jurisdiction: no service *ex juris* is permitted. The right of a claimant to bring an action *in rem* is an extremely potent remedy and a very large number of conflicts cases begin by the arrest of a ship. For an example of this power, see *Kuhr v. The Ship "Friedrich Busse"*, [1982] 2 F.C. 709, 134 D.L.R. (3d) 261 (F.C., T.D.).

A divorce proceeding is also an action *in rem* because, while there is no "thing" to be seized, the judgment binds third parties, i.e., those who might marry one of the former spouses. A valid divorce decree will provide a defence to a charge of bigamy and will be binding on the Department of National Revenue.

Apart from these two situations, any judicial proceeding where, upon judgment, a person gets good title to a thing, a chattel, a ship, land, in spite of the claims of anyone who, before the judgment would have had a claim, may be regarded as a judgment *in rem*.

MAREVA INJUNCTIONS

The case of *Lister v. Stubbs* (1890), 45 Ch. D. 1, (C.A.) established the rule that a plaintiff may not get an interlocutory injunction before trial that would prevent the defendant from dealing with its property in a way that might deprive the plaintiff, as an ordinary creditor, of any effective remedy if the plaintiff were ultimately successful in its action. This rule explains the great attraction of the remedy of specific performance and the registered certificate of pending litigation. An injunction to prevent the defendant from disposing of its property would be a kind of pre-judgment execution and this remedy is not generally available in Canada. When the defendant, when sued, had assets in the jurisdiction, but was able to move them outside the jurisdiction, the position of the plaintiff was even more precarious. The next case was the first to question to applicability of the rule in *Lister v. Stubbs* in all situations, particularly that where the defendant is a foreign corporation.

2. An "Anton Piller" order, from the case, *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] Ch. 55, (C.A.), is an order permitting the plaintiff to get access to the defendant's premises to search out, for example, pirated records, tapes or videos. It raises some of the same issues as does a Mareva injunction. See Watson & McGowan, *Ontario Civil Procedure*, 1991-92, p. 560, Rule 45.01, and Sharpe, *Injunctions and Specific Performance*, (1983), pp. 111-118, ¶¶ 233-248.

ANTI-SUIT INJUNCTIONS

In addition to the capacity to control their own process with the doctrine of *forum non conveniens* courts have the ability to exercise a sort of "offensive" *forum non conveniens* by enjoining persons from starting or continuing actions in other jurisdictions. In other words, if one court will not (or cannot) stay or dismiss proceedings before it on grounds of forum non conveniens it may be possible for the defendant in that action to start a proceeding before in another jurisdiction and obtain an injunction against the first proceeding. As far as the defendant in the first action is concerned, such an injunction will have the same effect as if the first action had been stayed or dismissed on grounds of *forum non conveniens*. Technically speaking, such an injunction does not interfere with the first court's proceeding, for it only acts *in personam* on an individual (the plaintiff in the first proceeding).

Although the power to issue an anti-suit injunction is one with a long history, such injunctions have become common only within the last few years. The leading "English" case on anti-suit injunctions is the decision of the Privy Council in *SNI Aérospatiale v. Lee Kui Jak*, [1987] 3 W.L.R. 59, [1987] 3 All E.R. 510, an appeal from the courts of Brunei. There the Privy Council enjoined the defendant from continuing a wrongful death action in Texas. The following Canadian case also concerns personal injury and wrongful death litigation before the Texas courts, as do a number of other anti-suit cases in England and Canada.

Amchem Products Inc. et al. v. Workers' Compensation Board et al.
[1991] 1 W.W.R. 243, 75 D.L.R. (4th) 1
(B.C.C.A., McEachern C.J.B.C., Taggart & Hollinrake, JJ.A.)

[A large number of individuals who had been and in many cases still were British Columbia residents brought an action in Texas in respect of injuries allegedly suffered from working with asbestos in British Columbia. The Workers' Compensation Board was *dominis litis* in respect of those claims. There were 33 defendants, most of whom were asbestos manufacturers based in the United States. The defendants challenged the jurisdiction of the Texas courts on grounds of *forum non conveniens*, but were unsuccessful:

[The defendant asbestos companies then started an action in British Columbia requesting an injunction restraining the injured claimants from continuing the Texas action and damages for abuse of process. In a judgment of Esson C.J.S.C. reported at [1990] 2 W.W.R. 601, 42 B.C.L.R. (2d) 77, 65 D.L.R. (4th), they were successful in obtaining an interlocutory injunction. The injured workers appealed. HOLLINRAKE J.A., giving the judgment of himself and

I agree with what Chief Justice Esson said on this issue.

During the course of the hearing before us both sides sought leave to introduce new evidence. The evidence sought to be introduced by both sides does not meet the test for its admissibility in this Court. That evidence was available to the parties before the hearing in the court below. This is an appeal from a discretionary order and in my view this Court should decide the matter on the basis of the evidence that was before the Chief Justice in the court below.

I would decline to admit this evidence.

It is apparent from what I have said that there is a fair question to be tried here. I do not think there is any ground for this Court to interfere with the discretion exercised by Chief Justice Esson in making the order he did.

[McEachern C.J.B.C. concurred in the result but with additional reasons.]

NOTES AND QUESTIONS

1. The court concludes that Texas is not a natural forum for this action. In this case the defendant corporations were scattered around the United States, so in the view of the Court of Appeal, no American state would have qualified as a natural forum. Given that it is not usually considered unnatural to bring an action in a defendant's home jurisdiction (and assuming it was reasonable to join all these defendants in a single action) why should a court not decide that any American state in which at least one of the defendants had an office qualified as a natural forum?

2. Canadian plaintiffs may find it attractive to bring actions in the United States for a number of reasons: wider pre-trial discovery rules, contingent fee arrangements, attractive doctrines of substantive law, greater availability of punitive damages, higher damages awards generally, and the greater availability of juries. If American courts are prepared to entertain such suits then—at least where the defendants are Americans, as in *Amchem*—why should Canadian courts be concerned with that?

3. The Supreme Court of Canada has granted leave to appeal and the case should be heard there late in 1991. That will be the first time the Supreme Court will consider an anti-suit injunction.

THE CONSTITUTIONAL COMPONENT

The rules which we have just been discussed have been largely developed from English rules. In only a very few cases has any mention been made of the fact that, unlike England, Canada is not a unitary state but a federal one. The importance of this fact is that a mechanism exists to control excessive assertions of provincial power. The Supreme Court of Canada can, as we saw in *Moran v. Pyle National (Canada) Ltd.* (*supra*, p. ?), authoritatively determine the

circumstances under which the Saskatchewan courts can assert jurisdiction over an Ontario resident. When the Supreme Court heard the appeal in *Moran* it was sitting both as the final court of appeal for Saskatchewan and as a national court. One would, for example, expect the same result to follow if the court were hearing an appeal from Newfoundland or British Columbia. A national perspective on the issue of the power of one province to permit service *ex juris* is very important. We will see in the next chapter that the development of such a perspective is essential for the rational solution of the problem of recognizing and enforcing judgments of foreign courts.

It is possible (and indeed one of us is convinced that the development has begun) to see in *Moran v. Pyle National* and, more directly, in *De Savoye v. Morguard Investments*, *infra*, the articulation of exactly the same test in Canada as has been developed in the United States. We shall have to examine the latter decision before the details of the test can be explored and the issues and problems that it raises are identified.

An example of the situation where the issue of jurisdiction has an overtly constitutional dimension is provided by the following American case. Most of the important cases are referred to in the judgment. Some brief background to the case might be of interest. The accident out of which the litigation arose occurred in Creek County, Oklahoma. Creek County juries are famous (or notorious) for the generosity of their damage awards. The parties had, therefore, important financial concerns in the outcome of the litigation. The respondent in the case in the Supreme Court is the District Judge for Creek County, Oklahoma. The form of the action is that the appellants seek a writ of prohibition against the judge who is the named respondent. He is, of course, represented in effect by the plaintiffs.

The Fourteenth Amendment to the U.S. Constitution states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

World-Wide Volkswagen Corp. v. Woodson
(1980), 444 U.S. 286, 100 S.Ct. 559.
(United States Supreme Court)

[Some footnotes have been omitted]

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue before us is whether, consistently with the Due Process Clause of the Fourteenth Amendment, an Oklahoma court may exercise *in personam* jurisdiction over a nonresident automobile retailer and its wholesale distributor

> the State and other parties in proceeding with the case in a particular forum are such considerations.
>
> Another consideration is the actual burden a defendant must bear in defending the suit in the forum. . . . Because lesser burdens reduce the unfairness to the defendant, jurisdiction may be justified despite less significant contacts. The burden, of course, must be of constitutional dimension. Due process limits on jurisdiction do not protect a defendant from all inconvenience of travel, . . . and it would not be sensible to make the constitutional rule turn solely on the number of miles the defendant must travel to the courtroom. Instead, the constitutionally significant "burden" to be analyzed relates to the mobility of the defendant's defense. For instance, if having to travel to a foreign forum would hamper the defense because witnesses or evidence or the defendant himself were immobile, or if there were a disproportionately large number of witnesses or amount of evidence that would have to be transported at the defendant's expense, or if being away from home for the duration of the trial would work some special hardship on the defendant, then the Constitution would require special consideration for the defendant's interests.
>
> The considerations other than contacts between the forum and the defendant are relevant necessarily means that the Constitution does not require that trial be held in the State which has the "best contacts" with the defendant.
>
> The defendant has no constitutional entitlement to the best forum or, for that matter, to any particular forum.
>
> Under even the most restrictive view of *International Shoe*, several States could have jurisdiction over a particular cause of action. We need only determine whether the forum States in these cases satisfy the constitutional minimum.

QUESTIONS AND NOTES

1. Compare the approaches of the Canadian and U.S. Supreme Courts as they are outlined in *Moran* and *World-Wide Volkswagen*, and consider the following questions:

   (a) To what extent are the concerns of the two courts the same?

   (b) Can the Supreme Court of Canada avoid all the complexities of the U.S. position?

   (c) To what extent is Canada hampered in its effort to develop satisfactory rules by the fact that there may be nothing equivalent to the Fourteenth Amendment in the *Charter*?

2. The American Supreme court backed off somewhat from the fairly strong pro-defendant bias in *World-Wide Volkswagen* in *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinée* (1982), 102 S. Ct. 2099 (hereafter *CBG*). It seems unlikely that the latter case represents a significant

new departure, though it is, in the long run, doubtful if *World-Wide Volkswagen* really has created what one commentator has called "a plaintiffs' hell and a defendants' paradise". (Kamp, "Beyond Minimum Contact; The Supreme Court's New Jurisdictional Theory" (1980), 15 *Georgia L. Rev.* 19, 53.) See also *Keeton v. Hustler Magazine* (1984), 104 S. Ct. 473, and *Calder v. Jones* (1984), 104 S. Ct. 1482, two multi-state libel actions which the Supreme Court considered after *CBG*. See also, *Shaffer v. Heitner* (1977), 433 U.S. 186, 97 S.Ct. 2569; *Kulko v. Superior Court* (1978), 436 U.S. 84, 98 S. Ct. 1690; *Rush v. Savchuk* (1980), 444 U.S. 320, 100 S.Ct. 571; and, for a discussion of this problem in the context of class actions, *Phillips Petroleum Co. v. Shutts* (1985), 105 S. Ct. 2985. An interesting recent article is, Maier & McCoy, "A Unifying Theory for Judicial Jurisdiction and Choice of Law" (1991), 39 *Am. J. Comp. Law*. 249.

3. Another recent decision of the American Supreme Court on the constitutional limits of state long-arm jurisdiction is *Asahi Metal Industry Co., Ltd. v. Superior Court* (1987), 107 S. Ct. 1026. It concerned California's interesting long-arm statute which, rather than list a series of situations in which defendants may be served out of state, simply authorizes jurisdiction to be taken "on any basis not inconsistent with the Constitution of this state or of the United States." (Cal. Code Civ. Proc. Ann., para. 410.10)

4. In an ideal federal system what would the rules regarding inter-provincial "long-arm" judicial jurisdiction (i.e., the rules regarding service *ex juris*) look like? You should reconsider this question as you read the cases in the next section dealing with the Recognition and Enforcement of Foreign Judgments.

5. The *Charter of Rights and Freedoms* provides in s. 7:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

There is no mention of "property rights" in s. 7 as there is in the Fourteenth Amendment to the U.S. Constitution, and we would have to worry about the degree of coincidence between "due process" and "the principles of fundamental justice".

6. Could something be made of s. 15(1) of the *Charter*?

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

7. There is one Canadian case which directly considers the impact of the constitution on the reach of provincial service *ex juris* rules: *Dupont v. Taronga Holdings Ltd.*, (1986), 49 D.L.R. (4th) 335 (Qué. S.C.). It concerned s. 209 of Québec's *Securities Act*, S.Q. 1982, c. 48 which had very broad service *ex juris* rules for alleged violations of that statute. The court acknowledged that s. 92 of the *Constitution Act, 1867* must set some territorial limits on the scope of provincial service *ex juris* rules and found that the test which Dickson J. set out in *Moran v. Pyle*, *supra*, provided an appropriate standard for determining those limits. However the court found that the foreign defendant had not proven that this standard was violated so that in this case the service *ex juris* was constitutional.

8. The Supreme Court of Canada mentioned *Dupont v. Taronga* in *De Savoye v. Morguard Investments Ltd.* and had some additional interesting things to say about the constitutional aspects of judicial jurisdiction. The *Morguard* case dealt with the enforcement of judgments, so the Supreme Court's words on territorial jurisdiction were, strictly speaking, *obiter*. They were, however, well-considered and important *obiter*, and we will need to return to this issue after we study the case in the next chapter.